93-380

No. _____

SUPREME COURT, U.S.
FILED
SEP 7 1993
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In The

Supreme Court of the United States

October Term, 1993

JOHN ERIC PRICE,

Petitioner,

vs.

U.S. IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does Question 18 of Immigration and Naturalization Service (INS) Form N-400, which requires a resident alien applying for citizenship to list each and every organization to which that resident alien has ever belonged, exceed the INS' power as delegated by Congress?

2. What is the standard of judicial review of INS actions that impinge upon a lawful resident alien's First Amendment rights during the resident alien's naturalization process?

3. Did the INS contravene petitioner's First Amendment rights by requiring him to answer Question 18 of INS Form N-400?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, John Eric Price, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, filed April 20, 1992.

OPINIONS AND ORDERS BELOW

The original opinion of the United States Court of Appeals for the Ninth Circuit is reported at *Price v. U.S. I.N.S.*, 941 F.2d 878 (9th Cir. 1991) and is reproduced in Appendix A, *infra*. Upon petition for rehearing, the opinion was withdrawn, and a substituted opinion was filed on April 20, 1992. The substituted opinion is reported at *Price v. U.S. I.N.S.*, 962 F.2d 836 (9th Cir., 1992) and is reproduced in Appendix B, *infra*. On June 7, 1993 the Court of Appeals

issued an order, reproduced in Appendix C, *infra*, denying petitioner's second petition for rehearing and suggestion for rehearing *en banc*. The unpublished memorandum opinion of the United States District Court for the Northern District of California (Ingram, William A.) is reproduced in Appendix D, *infra*.

JURISDICTION

The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Ninth Circuit by writ of certiorari is invoked under 28 U.S.C. section 1254(1). On June 7, 1993, the Court of Appeals denied a timely petition for rehearing and suggestion for rehearing *en banc* of its substituted opinion filed on April 20, 1992, affirming an order of the United States District Court for the Northern District of California denying petitioner's petition for naturalization. This petition was timely filed within 90 days of that date as required by 28 U.S.C. section 2101(c); Sup.Ct.R. 12, 13.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Goverment for a redress of grievances." U.S. Const., Amendment I.

The Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1424, 1443, 1445(a) and 1446(b), are reproduced in Appendix E, infra.

STATEMENT OF THE CASE

A. Statement of facts.

John Eric Price is a native of England and a citizen of the United Kingdom (CD# 6, Exhibit 1, Form N-400, Question

3)[1]. Mr. Price became a lawful resident alien of this country on April 25, 1960 (CD# 6, Exhibit 1, Form N-400, Question 12). Mr. Price registered with the United States Selective Service at that time (CD# 6, Exhibit 1, Form N-400, Question 30). He has continuously resided and worked as an engineer in the United States since that date (CD# 6, Exhibit 1, Form N-400, Questions 13 and 32). His record as a resident of this country is unblemished (CD# 6, Exhibit 1, Form N-400, Question 17).

Mr. Price has been married to his wife, Rosalie, an American citizen, for 30 years (CD# 6, Exhibit 1, Form 400, Question 33). They have lived in their present neighborhood in Palo Alto, California for 30 years (CD# 6, Exhibit 1, Form 400, Question 14). They have one child, age 29, who was born and raised in California (CD# 6, Exhibit 1, Form 400, Question 35).

On April 21, 1984, Mr. Price submitted an application to file petition for naturalization (CD# 6, Exhibit 1, Form N-400). On May 13, 1985, he submitted to a preliminary investigation under oath before a naturalization officer (CD# 6, Further Preliminary Examination, page 5). On July 6, 1988, after the INS refused to act on his petition for three years, he moved to calendar his petition for final hearing before the United States District Court for the Northern District of California pursuant to section 336 of the Immigration and Nationality Act ("INA"), 8 U.S.C. section 1447. On July 27, 1988, he submitted to an additional preliminary examination (CD# 6, Further Preliminary Examination).

Mr. Price willingly answered every specific question seeking information about prescribed conduct and affiliations (CD# 6, Further Preliminary Examination, pp. 14-16). Mr. Price fully and unequivocally answered in the negative *all*

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[1] References are to the Excerpts of Record filed with the Court of Appeals for the Ninth Circuit in Case No. 89-16457 on Appeal from an Order of the United States District Court for the Northern District of California. The documents contained in the Excerpts of Record are tabbed and referenced herein by their Court Docket No. ("CD#") in the District Court.

questions specifically directed at obtaining any information concerning organizations covered by Section 313 of the INA[2] (CD# 6, Further Preliminary Examination; CD# 16, 17, and 18). Mr. Price responded in the negative to *all* questions concerning whether he has or has had any affiliation with communist or totalitarian organizations (CD# 6, Further Preliminary Examination). In addition, Mr. Price responded in the negative to *all* questions concerning whether he had ever advocated, taught, believed in, published in support of or knowingly aided such groups (CD# 6, Further Preliminary Examination). Moreover, Mr. Price indicated his familiarity with the conduct proscribed by section 313 and affirmed that he had not engaged in any proscribed conduct (CD# 6, Further Preliminary Investigation).

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[2] Section 313 of the INA, codified at 8 U.S.C. section 1424, provides that no person shall be naturalized as a United States citizen if he or she:

(1) Advocates or teaches, or is a member of any organization that advocates or teaches, opposition to all organized government;

(2) Is a member of the Communist Party of the United States, or any other totalitarian party of the United States, or any other in a series of listed organizations suspected of communist ties;

(3) Advocates the economic, international, governmental doctrine of world communism, or the establishment of a totalitarian dictatorship in the United States, or is a member of an organization that advocates either doctrine;

(4) Advocates or teaches, or is a member of any organization that advocates or teaches, the forcible or unconstitutional overthrow of the U.S. Government, or the "duty, necessity, or propriety" of killing officers of the United States or other organized government, or of destruction of property or sabotage;

(5) Writes, publishes or circulates any written or printed matter advocating any of the actions or doctrine listed in 3 or 4 above;

(6) Is a member of any organization that writes, publishes, or circulates any written or printed matter advocating any of the actions or doctrines listed in 3 or 4, above.

Nonetheless, in addition to the above discussed information, the INS demanded that Mr. Price list present and past membership in or affiliation with "every organization, association, fund, foundation, party, club, society or similar group in the United States or in any other country or place," (CD# 6, Exhibit 1, Question 18). Mr. Price refused to answer this question, Question 18 of his application, on the basis that it required him to divulge all associational ties without regard to their pertinence to his naturalization application (CD# 6, Further Preliminary Examination, p. 3).[3] The INS recommended that his application for naturalization be denied *solely* because he would not answer Question 18 (CD# 6, Form N-484 Naturalization Petitions Recommended to be Denied and accompanying Findings of Fact, Conclusions of Law and Recommendation of the Designated Naturalization Examiner).

B. The proceedings below.

On September 15, 1988, the INS filed its findings of fact, conclusions of law and recommendation of the Designated Naturalization Examiner recommending that Mr. Price's petition for naturalization be denied (CD# 6). Mr. Price filed an opposition (CD# 8), and on October 17, 1988, the parties appeared before the United States District Court for a final hearing on Mr. Price's petition (CD# 22). The district court ordered supplemental briefing on the matter on October 25, 1988 (CD# 11, 20, 23, 24, not included in the excerpts of record filed with the Court of Appeals). The district court observed that there was no case on point as to the First Amendment standard of review applicable during the naturalization process but then held that a limited standard applied and, on August 18, 1989, entered a judgment dismissing petitioner's action (CD# 25).

A notice of appeal to the United States Court of Appeals for the Ninth Circuit was timely filed on October 17, 1989

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[3] Question 18 of Form N-400 is now designated as Question 27 on the current INS Form N-400.

(CD# 26). Pursuant to 28 U.S.C. § 1291, the appeal was argued and submitted on March 14, 1991. On August 7, 1991, the Court of Appeals affirmed that a "limited standard of review" applied under which the government need demonstrate only that its acts were "facially legitimate and bona fide." Judge Noonan dissented, noting that Question 18 "chills the right of free association guaranteed by the First Amendment." Appendix A, *infra*. Upon petition for rehearing, the Court of Appeals withdrew its opinion. On April 20, 1992, the Court filed a revised opinion that did not change the Court's holding. Judge Noonan refiled his dissent without change. *Price*, 962 F.2d at 842. Appendix B, *infra*. On June 7, 1993, the Court of Appeals denied Mr. Price's second petition for rehearing and suggestion for rehearing *en banc*. Appendix C, *infra*.

REASONS FOR GRANTING THE WRIT

This case presents a question of first impression: What is the standard of judicial review of governmental action during a lawful resident alien's naturalization process, that impinge upon the resident alien's First Amendment rights? As the district court observed: "*there is no direct case on point with regard to the proper First Amendment standard to be applied in [a] naturalization proceeding.*" App. D, *infra*, p. 17 (emphasis added). The Court of Appeals, adopting the standard of judicial review applied in cases of aliens *outside* the United States who are without the rights guaranteed to members of our society, held that First Amendment questions in the naturalization context should receive "at most only limited judicial review." *Price*, 962 F.2d at 842. Thus, the Court of Appeals has articulated a new standard of review for all INS actions during the naturalization process.

This case and the questions it presents have significant implications for resident aliens and society as a whole. There are approximately ten million lawful resident aliens living in this country. From 1987 to 1991, close to a quarter of a

million people *each year* petitioned the United States government for naturalization.[4] Every one of these applicants was required, as a matter of standard INS procedure, to disclose every religious and social affiliation, without regard to its relevance to the government's inquiry or purpose. The same inquiry has been adjudicated by this Court to be violative of the First Amendment in every other context in which its has been considered. *See Shelton v. Tucker*, 364 U.S. 479 (1960) and cases cited *infra* at 20. As the dissenting opinion below observed:

> The Immigration Service propounds a question to persons seeking naturalization that would be intolerable if asked by a government agency of an American citizen. It is an intimidating question. It chills the right of free association guaranteed by the First Amendment.

Price v. U.S. I.N.S., 962 F.2d at 844 (dissenting opinion). Nonetheless, and irrespective of other evidence in the record clearly showing fitness for citizenship, if the applicant declines to answer this intrusive question, citizenship is denied.

Question 18 serves no rational governmental purpose. The record of the preliminary hearings demonstrates that Mr. Price, a thirty year exemplary member of our society, is of good moral character, is willing to take the oath of allegiance, adheres to the principles of the Constitution, and is fit to be a United States citizen (CD# 6, Further Preliminary Examination, pp. 14-16; CD# 22). The record also establishes that Mr. Price is not and has never been associated with any group the nature of which Congress has deemed undesirable for the purpose of granting citizenship as set forth in INA section 313. *Id.*

Moreover, the impact of this government action extends beyond the case of this individual applicant to impact on

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[4] *U.S. Immigration and Naturalization Service, Statistical Yearbook of the Immigration and Naturalization Service*, 1991, p. 122, U.S Government Printing Office: Washington, D.C., 1991.

society as a whole. This Court has consistently held that the freedom of every American to participate in various political and other lawful organizations is essential to the underlying purpose of the First Amendment for both citizens and resident aliens. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978) (the goals of the First Amendment are "discussion, debate, and the dissemination of information and ideas . . . " to all members of the community).

The application of a lessened standard of review in this instance has far reaching implications, needlessly chilling the exercise of First Amendment rights by a substantial community within our nation and stifling the marketplace of ideas. Moreover, the Ninth Circuit's rationale for applying a lessened standard of review cannot logically be confined to the First Amendment. Its decision may eviscerate judicial review of any INS action violative of the constitutional rights of lawful resident aliens. For example, as long as the INS action is "facially legitimate" and "undertaken with a good faith belief that relevant information may be obtained," the Ninth Circuit's analysis suggests the INS may take other action, such as tap phones, use undercover agents, eavesdrop, open mail or conduct other technological surveillance, all without a warrant or probable cause in its investigation of applicants for naturalization.

Accordingly, petitioner respectfully submits that the Congressional grant of authority under section 313 and related statutes should be construed narrowly so as not to authorize the INS to formulate intrusive inquiries such as Question 18. Alternatively, if section 313 and related statutes permit Question 18, then that grant should be subject to full scrutiny under the First Amendment and held unconstitutional, unnecessarily broad and invasive.

I. THE COURT SHOULD INTERPRET THE CONGRESSIONAL GRANT OF POWER TO THE INS NARROWLY SO AS TO AVOID THE SERIOUS CONSTITUTIONAL QUESTIONS UNDER THE FIRST AMENDMENT.

The INA does not explicitly authorize the INS to pose Question 18 or to inquire into all of the associational ties of an applicant for naturalization. Rather, section 313 of the INA requires the INS to determine a petitioner's ties only to *certain types of groups* of concern to the Legislature, in particular those opposed to organized government or committed to violent overthrow of the government. Through section 313, Congress delegated to the INS authority to question an applicant concerning associational ties within these limited, meaningful standards. Section 313 does not authorize the INS to inquire into *all* of Mr. Price's associational ties.[5] In contrast to the limitations of section 313, Question 18 requires applicants to list *all* associational ties irrespective of their relationship to section 313. Accordingly, Question 18 strays into matters beyond the substantive qualifications for naturalization established by the INA.[6]

While the district court relied on other general statutory provisions in construing the INS' authority to pose Question 18, including those authorizing the Attorney General to gather facts which may be material to the applicant's naturalization, to take "testimony * * * touching * * * the admissibility of any applicant for naturalization," 8 U.S.C. § 1446(b) and citing §§ 1445(a) and 1443(c), those provisions must be read

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[5] The maxim "*Expressio unius est exclusio alterius*" means "inclusion of one thing indicates exclusion of the other." By negative implication, the enumeration of certain things in a statute suggests the legislature had no intention to include things not listed.

[6] Section 1443 expressly limits examination and inquiry to qualifications to become a naturalized citizen. 8 U.S.C. § 1443(a).

in conjunction with section 313 which specifically deals with inquiry into associational membership.[7]

Moreover, these general phrases do not authorize the Attorney General to contravene petitioner's Constitutional rights. Rather, they allow the Attorney General broad authority *consistent* with the Constitution. As this Court has stated:

> [B]ecause of our firmly rooted tradition of freedom of belief, we certainly will not presume in construing the naturalization and denaturalization acts that Congress meant to circumscribe liberty of political thought by general phrases in those statutes.

Schneiderman v. United States, 320 U.S. 118, 132 (1943), *reh'g denied*, 320 U.S. 807 (1943).[8]

For these reasons, this Court has construed the immigration statutes in a manner consistent with the First Amendment whenever possible. In *Girouard v. United States*, 328 U.S. 61 (1946), a case analogous to the one presented here, the petitioner for naturalization responded in the negative, on religious grounds, to an INS application question asking if he was willing to bear arms in defense of the United States. The naturalization law in effect at the time required a petitioner to take a general oath that he would give allegiance to and, if necessary, defend the country against its enemies. This Court, emphasizing the value that this country has historically placed

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[7] Delegation without meaningful standards is unconstitutional. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 420-430 (1935); *Schechter Corp. v. United States*, 295 U.S. 495, 537-38 (1935); *Kent v. Dulles*, 357 U.S. 116, 129 (1958). Moreover, "[w]hen interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute." *Kokoszka v. Bedford* 417 U.S. 642, 650 (1974) (citations omitted), *reh'g denied*, 419 U.S. 886 (1974).

[8] Legislative history of the INA supports this interpretation. Senator McCarran, the primary sponsor of the bill enacted in 1952, which substantially replaced prior immigration statutes, stated in support of enactment "[this bill] does not, in any way, violate any rights guaranteed under the Constitution *to persons in this country*." 98 Cong. Rec. 7016 (1952) (emphasis added).

upon religious liberty, refused to infer that Congress intended to authorize, by implication, "[s]uch an abrupt and radical departure from our traditions * * * " as would be embodied in a requirement that an applicant for citizenship agree to bear arms contrary to religious convictions. *Id.* at 69.

Similarly, section 313 and the provisions cited above must be construed so as to prevent a conflict with the First Amendment. *Murray v. Schooner Charming Betsy*, 2 Cranch 64, 118, 2 L.Ed. 208 (1804); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). Congress has acknowledged that

> It is not in the interests of the United States to establish one standard of ideology for citizens and another for foreigners who wish to visit the United States.

H. Conf. Rep. No. 100-475, 100th Cong., 1st Sess., at 163, *reprinted in* 1987 U.S.C.C.A.N. (1987) 2370, 2424. As we shall demonstrate below, the breadth of Question 18 is inconsistent with the First Amendment; a result which cannot be imparted to Congress.

II. ALTERNATIVELY, IF QUESTION 18 IS LEGISLATIVELY AUTHORIZED, A STRICT STANDARD OF SCRUTINY UNDER THE FIRST AMENDMENT SHOULD BE APPLIED.

A. Full review under the First Amendment is required.

Three factors warrant full judicial review of the constitutional claim presented here, factors which are absent in every other case in which a lessened standard of review has been applied: (1) Petitioner is a lawful resident alien; (2) The case involves the First Amendment rights of a substantial portion of the United States population; and (3) The challenge is to a procedural matter rather than a substantive policy decision rendered by Congress in the exercise of its plenary power over immigration.

1. Resident aliens enjoy greater constitutional protection than other classes of aliens.

This Court has long recognized that resident aliens enjoy constitutional protection, and it has limited Congress' plenary power over immigration accordingly. In *INS v. Chadha*, 462 U.S. 919 (1983), this Court rejected the argument that Congress has unreviewable authority over the regulation of aliens stating

> The plenary authority of Congress over aliens under Art. I, § 8, cl. 4, is not open to question, but what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing that power. . . . *Congress has plenary authority in all cases in which it has substantive legislative jurisdiction, . . . so long as the exercise of that authority does not offend some other constitutional restriction.*

Id. at 940-941 (quoting *Buckley v. Valeo*, 424 U.S. 1 (1976) (emphasis added)).[9] The government "has no discretion with which to violate the constitutional rights" of resident aliens;

> *[O]nce an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders.* Such rights include those protected by the First and the Fifth Amendments. . . . *None of these provisions acknowledges any distinction between citizens and resident aliens.* They extend their

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[9] *See also Fong Yue Ting v. United States*, 149 U.S. 698, 712-713 (1893) (discussing Congress' plenary power and political nature of immigration questions, and concluding judiciary must intervene as " . . . required by the paramount law of the Constitution . . . "); *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973) ("It is clear, of course, that no Act of Congress can authorize a violation of the Constitution"; INA cannot authorize government search and seizure inconsistent with Fourth Amendment); *Carlson v. Landon*, 342 U.S. 524, 537 (1952) ("[t]he power to expel aliens . . . is, of course, subject to judicial intervention under the 'paramount law of the Constitution' ").

> inalienable privileges to all 'persons' and guard against any encroachment on those rights by federal or state authority.

Kwong Hai Chew v. Colding, 344 U.S. 590, 596-597, n. 5 (1953) (quoting *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring) (emphasis added))[10]. Similarly, this Court held in *Landon v. Plasencia, supra*, that exclusion proceedings of returning resident aliens must meet the Constitutional requirements of due process, not merely what Congress says is due.

Resident aliens are at the apex of the hierarchy of aliens with respect to entitlement to constitutional protection. In 1990, this Court reaffirmed the ascending scale of rights an alien enjoys as he or she increases identity with American society. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950) ("the alien . . . has been accorded a generous and ascending scale of rights as he increases his identity with our society")). The attachment of an alien's constitutional rights relates to his or her physical presence, societal connection and corresponding societal obligation of the individual. *United States v. Verdugo-Urquidez*, 494 U.S. at 269. Thus, a

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[10] Referring to the *Kwong Hai Chew* decision, this Court has stated that "[a]lthough the holding was one of [statutory] interpretation, the rationale was one of constitutional law." *Landon v. Plasencia*, 459 U.S. 21, 33 (1982). *See also United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990), and *Hellenic Lines v. Rhoditis*, 398 U.S. 306, 309, n. 5 (1970) also citing *Bridges v. Wixon*, 326 U.S. at 161; *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (applying Fourteenth Amendment to resident aliens); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (resident aliens entitled to Fifth and Sixth Amendments); *Rafeedie v. I.N.S.*, 880 F.2d 506 (D.C. Cir. 1989) (resident alien entitled to due process in deportation proceedings); *Stokes v. United States, Immigration & Nat. Serv.*, 393 F. Supp. 24, 29 (S.D.N.Y. 1975) (petitioners seeking "immediate relative" status for non-citizen wife protected by Fourth Amendment); *Kwong Hai Chew's* rationale is so widely accepted as to apply even to aliens residing illegally in this country. *See Plyler v. Doe*, 457 U.S. 202, 211-212 (1982) (undocumented aliens protected by Equal Protection Clause).

lawful, permanent, resident alien seeking naturalization is at the top of this ascending scale.[11]

Accordingly, resident aliens have greater rights than non-resident aliens. The distinction between the rights of those seeking admission and those residing within the United States is long-standing.

> *[O]ur immigration laws have long made a distinction between those aliens who have come to our shores seeking admission . . . and those who are within the United States after an entry, irrespective of its legality. In the latter instance the Court has recognized additional rights and privileges not extended to those in the former category who are merely 'on the threshold of initial entry.'*

Leng May Ma v. Barber, 357 U.S. 185, 187 (1958) (emphasis added). *See* also *Bridges v. Wixon*, 326 U.S. at 161.

In offering a minimal standard of review to Mr. Price's First Amendment claim, the Court of Appeals relied almost exclusively on language in *United States v. Verdugo-Urquidez*, 494 U.S. 259, *Kleindienst v. Mandel*, 408 U.S. 753 (1972), and *Fiallo v. Bell*, 430 U.S. 787 (1977). However, *Verdugo-Urquidez* held only that the Fourth Amendment is inapplicable to an extraterritorial search conducted in Mexico of a Mexican resident and citizen who had "no voluntary attachment to the United States." *Verdugo-Urquidez*, 494 U.S.

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[11] A review of the Framers' writings reveals an intention to cover resident aliens:

> It does not follow, because aliens are not parties to the Constitution, as citizens are parties to it, that, whilst they actually conform to it, they have no right to its protection. Aliens are no more parties to the laws than they are parties to the Constitution; yet it will not be disputed that, as they owe, on one hand, a temporary obedience, they are entitled, in return, to their protection and advantage. Madison's *Report on the Virginia Resolutions* (1800), reprinted in 4 *Elliot's Debates* 556 (2d ed. 1836),

quoted in *U.S. v. Verdugo-Urquidez*, 494 U.S. at 284 (Brennan, J., dissenting).

at 274. Indeed, *Verdugo-Urquidez* reiterated that constitutional rights adhere to *lawful resident aliens* "who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Id.* at 265.

Neither *Kleindienst* nor *Fiallo* involved the First Amendment rights of permanent resident aliens seeking naturalization. In *Kleindienst*, the First Amendment claims were the *indirect* third-party claims of United States citizens, who argued that an INS decision to deny a non-immigrant visa to a nonresident alien author because of his Marxist writings violated their First Amendment rights. That indirect First Amendment claim, resulting from a denial of a visa to a foreign visitor, is tenuous when compared with direct infringement upon the associational rights of ten million resident aliens residing in the United States. Similarly, in *Fiallo v. Bell*, 430 U.S. 787, this Court rejected a challenge to the INA's special preference immigration status, which discriminated on the basis of sex and illegitimacy against *aliens outside this country*. The ruling in *Fiallo* was expressly based on Congress' "*power to expel or exclude aliens*," or to "*policies pertaining to the entry of aliens and their right to remain here*," *Price*, 962 F.2d at 841, App. B at 11-12, (emphasis added) quoting *Fiallo*, 430 U.S. at 792-93.

Accordingly, both *Kleindienst* and *Fiallo* are inapposite. They involve the government's broad power to *exclude* aliens from the United States and are *not* determinative of its powers vis-a-vis individuals (1) who reside in the United States; (2) who have been afforded permanent resident alien status and Constitutional protection; and (3) who seek to be naturalized.[12] A recent ruling of this Court has so characterized

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[12] Lacking a decision of this Court on point, there is inconsistency and confusion among the courts as to the standard of review to be applied in these cases. *See, e.g., Fernandez-Santander v. Thornburgh*, 751 F. Supp. 1007, 1009 (D. Me. 1990) (rejecting the applicability of the *Fiallo* standard to the Fifth Amendment rights of an alien incarcerated after completion of sentence) vacated and remanded without reported opinion by *Fernandez-*

and distinguished these cases. *See Landon v. Plasencia*, 459 U.S. at 32.

2. The violation of First Amendment rights of resident aliens particularly warrants close scrutiny.

This Court specifically has held that aliens are entitled to First Amendment protection. As discussed, supra, at 10, perhaps the closest case on point is *Girouard v. United States*. Although *Girouard* was ultimately decided on statutory interpretation grounds, its reasoning strongly suggests that a resident alien's First Amendment associational rights do not dissipate in the naturalization context. Thus, this Court concluded that, because a requirement that a petitioner for naturalization agree to bear arms would be unconstitutional, Congress did not intend to enact such a requirement. *Id.* at 64. The Court overruled *United States v. Schwimmer*, 279 U.S. 644 (1929), a prior contrary decision, as wrongly decided and adopted the dissenting opinion of Justice Holmes therein

> [I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought – not free thought for those who agree with us but freedom for the thought that we hate. . . . *We should adhere to that principle with regard to admission into, as well as to life within this country.*

Girouard at 68 (emphasis added).[13] Similarly, in *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952), the Court found that the

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Santander v. Thornburgh, 930 F.2d 906 (1st Cir. 1991); *American Arab Anti-Discrimination Com. v. Meese*, 714 F. Supp. 1060 (C.D. Cal. 1989), (rejecting application of *Fiallo* and *Kleindienst* to First Amendment challenge to deportation), affirmed in part, reversed in part, by *American-Arab Anti-Discrimination Comm. v. Thornburgh*, 970 F.2d 501 (9th Cir. 1991) (constitutional challenge not ripe for adjudication).

[13] Even *undocumented* aliens are entitled to the First Amendment's protection in deportation proceedings. In *Parcham v. I.N.S.*, 769 F.2d 1001 (4th Cir. 1985), the court held that the First Amendment applied to the

First Amendment did not bar deportation, not because it was inapplicable to deportation proceedings, but because it did not protect the advocacy of violence under the then applicable First Amendment standard of *Dennis v. United States*, 341 U.S. 494 (1951), *reh'g denied*, 342 U.S. 842 (1951).

There is a good reason to apply full First Amendment protection to resident aliens. As this Court has observed, "resident aliens, like citizens, pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society." *In re Griffiths*, 413 U.S. 717, 722 (1973). Restrictions on the First Amendment rights of resident aliens uniquely impact upon the First Amendment interests of citizens by stifling association and distorting the market place of ideas. This interrelationship of constitutional interests of resident aliens and citizens exists in respect to no other constitutional right as directly and significantly as it does in the First Amendment context.

3. This case involves a challenge to a procedural matter and is different from challenges to a substantive policy determination of Congress about immigration and naturalization.

Petitioner acknowledges that in some cases this Court has held that the federal government may in certain circumstances discriminate between citizens and resident aliens. *See, e.g., Mathews v. Diaz*, 426 U.S. 67, 77-78 (1976) (aliens enjoy the due process protections of the Fifth Amendment, but process due may be less than that granted to citizens). However, cases permitting such discrimination involve judicial review of *substantive* determinations by Congress. Judicial deference to the federal government's restriction on the rights of aliens in

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determination whether an undocumented alien who had participated in demonstrations against the Shah of Iran could voluntarily depart the United States rather than face deportation. Although the court concluded that the First Amendment did not protect the alien's participation in a violent demonstration, it nonetheless agreed that First Amendment protection applied.

these cases is based in large part upon the fact that Congress' exercise of plenary power over immigration touches upon matters of foreign relations, and thus presents political questions either beyond or at the periphery of judicial review. *See, e.g., Mathews v. Diaz*, 426 U.S. 67; *Kleindienst*, 408 U.S. 753.

By contrast, assuming that Question 18 is indeed within the scope of the grant of power to the INS, this case presents the question of the nature of judicial review applicable to the procedure designed to implement Congress' substantive determination as to the qualifications that Congress has mandated for citizenship; for example, the *types* of organizations Congress has designated as undesirable in Section 313.[14] Petitioner does not challenge that determination. Rather, petitioner challenges the *method* of accomplishing the substantive task as unnecessarily intrusive. Here, because the issue in this case is one of procedure, there is no basis for deferring to Congress' plenary power over foreign affairs. The issue is whether the effectuation of Congress' purpose in excluding a certain class of aliens from becoming citizens can be accomplished by a more precise investigatory tool, *i.e.*, whether the *scope* of the investigation is constitutionally overbroad. This procedural question concerning the scope of investigation does not challenge a substantive decision made by Congress as to which classes of aliens are eligible for naturalization or who should receive government benefits. Determining whether the scope of the investigation is overbroad and unnecessary is a uniquely justiciable task. Thus, there is no basis for alleging anything less than the full standard of First Amendment review in this context.

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[14] Petitioner does not concede the constitutionality of Section 313, particularly if it is not construed in a manner consistent with general First Amendment jurisprudence. Because petitioner has not been a member of any organization falling under Section 313, he has no reason to challenge its legality in this suit.

B. Question 18 violates the First Amendment.

There can be little doubt that under traditional First Amendment jurisprudence, Question 18 is unconstitutional. In *Shelton v. Tucker*, 364 U.S. 479 (1960), this Court held that, while a state has an interest in investigating the competence and fitness of its schoolteachers, the First Amendment prohibits it from requiring teachers to disclose all of their associational ties, many of which "could have no possible bearing upon the teacher's occupational competence or fitness." *Id.* at 488. The *Shelton* court found that the statute impermissibly created the "pressure upon a teacher to avoid any ties which might displease those who [controlled] his professional destiny . . . " and that more restricted inquiries would accomplish the same purpose. *Id.* at 486.

INS Question 18 is the same question this Court struck down in *Shelton*. It requires resident aliens seeking citizenship to

> reveal the church to which he belongs, or to which he has given financial support. It requires him to disclose his political party, and every political organization to which he may have contributed. . . . It requires him to list, without number, every conceivable kind of associational tie – social, professional, political, avocational, or religious.

Shelton at 488. As this Court concluded in *Shelton*, "[m]any such relationships could have no possible bearing upon [the substantive requirements of the applicable statute]." *Id.* at 488.

This Court has also held in numerous other contexts that compelled disclosure of memberships and affiliations contravenes the right of association traditionally protected by the First Amendment.[15] The First Amendment protects against the

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[15] *See*, for example, *Talley v. California*, 362 U.S. 60, 64-65 (1960) (upsetting convictions based on ordinance which banned the distribution of handbills which did not carry the name and address of the author, printer and sponsor); *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 463-6 (1958)

compelled disclosure of one's associations because such disclosures "can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. at 87, 91, quoting *Buckley v. Valeo*, 424 U.S. at 64. These cases require the government to show a compelling interest when acting to chill otherwise lawful associations and to avoid unlimited and indiscriminate inquiries into one's associational ties. Accordingly, the First Amendment requires the government to ask questions designed to elicit only that information which could have a reasonable bearing on the person's qualifications for the benefit at issue, in this case, citizenship.

This Court has long held the government may only infringe upon the First Amendment right to free association when it has a compelling justification and a more restrictive alternative is unavailable. *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). The government's interest in learning about section 313 affiliations or character in general

> cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.

Shelton, 364 U.S. at 488. Question 18 is apparently intended to assist the INS in ascertaining whether the petitioner has joined any organizations or engaged in any activities that would disqualify him from naturalization under section 313 of the INA or ascertaining "character" in general. However, such a sweeping inquiry is no more necessary in this case than in

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(reversing civil contempt judgment against NAACP for refusing to disclose its membership list in enforcement of corporate regulation); *Bates v. Little Rock*, 361 U.S. 516, 522-23 (1960) (state could not ask for membership list to enforce occupational license tax); *Louisiana v. N.A.A.C.P.*, 366 U.S. 293 (1961) (affirmed temporary injunction against enforcement of statute requiring certain non-profit organizations to file membership lists); *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 95 (1982) (mandatory disclosure of campaign contributors unconstitutional if applied to socialist workers' party); *see also Buckley v. Valeo*, 424 U.S. at 64.

the other cases listed above. As in *Shelton*, the government has not put forward any reason why this inquiry cannot be accomplished with more specific questions.

In fact, all of those issues have been addressed by the more specific questions which petitioner has answered in full. Mr. Price gave complete answers to *all* questions posed to him by the INS designed to determine whether he fell under any of the aforementioned exclusionary categories of section 313. The government has made no showing why it is necessary to engage in the sweeping inquiry imposed by Question 18.[16] The government's practices in other areas demonstrate that a more narrow inquiry is available here.[17]

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[16] It cannot be maintained that Question 18 legitimately produces information that would be of general assistance to the INS in its own independent investigation of an applicant's qualifications for naturalization. This Court has placed severe restrictions upon the use of a general "investigative" justification for inquiries that impinge upon the right of free association. In *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971) and *In re Stolar*, 401 U.S. 23 (1971), the Court struck down questions by state bars that asked applicants for membership whether they had ever belonged to the Communist Party or any other organization advocating the violent overthrow of the government. Citing *Shelton v. Tucker*, four members of the Court declared that, even if the questions were asked for the purpose of determining whether further investigation of an individual bar applicant might be warranted, the questions were nevertheless improper since the very prospect of facing such an investigation might deter potential bar applicants from engaging in protected associational activities. *In re Stolar*, 401 U.S. at 28. Justice Stewart concurred, stating that any inquiries about prohibited memberships should at least be confined to "knowing membership." *Baird v. State Bar of Arizona*, 401 U.S. at 9.

It is also questionable whether the I.N.S. can be permitted to conduct an investigation under the nebulous standard of "good moral character". *See In re Naturalization of Denessy*, 200 F. Supp. 354, 358 (D. Del. 1961) ("What is 'good moral character'? The question is comparable to asking 'what is beauty' or 'what is great art'. No two people are likely to agree.)" *See also*, *Price*, 962 F.2d at 845, dissenting opinion, Noonan, C.J.

[17] For example, the government accepts a yes/no response to questions such as "have [you] received your income mostly from illegal

CONCLUSION

This Court should establish constitutional standards applicable to the INS within the naturalization process to avoid the INS' unfettered discretion to act beyond constitutional bounds. Petitioner acknowledges that "[n]o alien has the slightest right to naturalization unless all statutory requirements are complied with." *Price*, *infra*, Appendix B, at 14, (quoting *Fedorenko v. United States*, 449 U.S. 490, 506 (1981)). Also, petitioner accepts that "the burden is on the alien applicant to show his eligibility for citizenship in every respect." *Id.* (quoting *Berenyi v. Immigration Director*, 385 U.S. 630, 637 (1967)). However, in *Perry v. Sindermann*, 408 U.S. 593 (1972), this Court held that

> even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. *It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially his interest in freedom of speech.* For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.

Id. at 597 (emphasis added). *See also Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 545 (1983).

Resident aliens should not be consigned to "second class citizenship" for the rest of their lives. Denied the right to vote, resident aliens cannot directly participate in the political community. Moreover, the states also have the "power to exclude aliens from participation in [state] democratic political institutions . . . " (*Sugarman v. Dougall*, 413 U.S. 634, 648 (1973) (also holding that classifications based on alienage are subject to close judicial scrutiny)) and may deny them the

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gambling" and "have [you] been an illegal trafficker in narcotic drugs or marijuana?" CD# 6, Exhibit 1, question 26.

chance, for example, (1) to run for elective office; (2) to hold jobs in law enforcement; and (3) to teach. *Foley v. Connelie*, 435 U.S. 291, 296 (1978); *Ambach v. Norwick*, 441 U.S. 68 (1979); *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982). Accordingly, the right to seek naturalization is of critical importance to resident aliens. It is unfair and unconstitutional to require resident aliens seeking to escape "second class citizenship" to forego their constitutional rights in the process.

For the foregoing reasons, petitioner respectfully requests that this Petition be granted.

Respectfully submitted,

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APPENDIX

FOR PUBLICATION

United States Court of Appeals

For The Ninth Circuit

No. 89-16457
D.C. No. PET-21298-WAI

JOHN ERIC PRICE,
Petitioner-Appellant,

v.

UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE,
Respondent-Appellee.

OPINION

Appeal from the United States District Court
for the Northern District of California
William A. Ingram, Chief Judge, Presiding

Argued and Submitted
March 14, 1991—San Francisco, California

Filed August 7, 1991

Before: Robert R. Beezer and John T. Noonan, Jr., Circuit Judges, and James K. Singleton,* District Judge.

Opinion by Judge Beezer; Dissent by Judge Noonan

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* The Honorable James K. Singleton, United States District Judge for the District of Alaska, sitting by designation.

SUMMARY

Constitutional Law/Immigration and Naturalization

Affirming a district court judgment denying a petition for naturalization, the court of appeals held that the United States Attorney General had the statutory authority to require a resident alien seeking citizenship to list organization membership without violating appellant's freedom of association.

Appellant John Eric Price, a lawfully admitted United States permanent resident, sought naturalization. Although Price answered all questions on the application, he refused to answer Question 18 requiring the listing of present or past membership in organizations. Price answered negatively all other inquiries on the application concerning his involvement or membership in organizations espousing Communism. Price later swore that he was not thinking of any professional or social organization knowledge of which he intended to keep from the INS. Price also swore that he was not and had not been a member of organizations, or involved in activities, in which participation will bar an alien from being naturalized. On the basis of his refusal to answer Question 18, the district court denied Price's petition for naturalization on the INS' recommendation. Price argued that that question exceeds the statutory authority granted the Attorney General, and that the question violates his first amendment right to freedom of association.

[1] The Immigration and Naturalization Act authorizes the Attorney General to prescribe the scope and nature of the examination of petitions for naturalization as to their admissibility to citizenship. Thus, the Attorney General is given very broad authority to make inquiries as long as they are related in some way to the naturalization requirements. [2] Price argued that by listing in 8 U.S.C. § 1424(a) certain types of organizations whose alien members or affiliates are barred from naturalization, Congress implicitly prohibited the Attorney General from denying naturalization on the basis of association with any other organization. However, there was no legislative history either supporting or undermining the assumption that that section was intended to be an exclusive list. [3] Although section 14124(a) does not appear

to require knowledge on the part of the petitioner that the organization is of the type described, the court did not need to resolve that issue here. In at least one circumstance, Congress explicitly gave the Attorney General the responsibility of determining whether a given organization falls within section 1424(a). Only by examining all organizations with which the petitioner is affiliated can the Attorney General determine whether the petitioner had reason to believe the organization is or was a Communist-front. [4] The court agreed with the INS' contention that membership in types of organizations not described in that section may be relevant to other requirements of naturalization. Therefore, Question 18 does not exceed the broad authority given the Attorney General to implement the naturalization statutes.

[5] The court noted that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application. However, once an alien gains admission and begins to develop ties that go with permanent residence, his constitutional status changes accordingly. [6] However, the protection afforded resident aliens may be limited. In the exercise of its broad power over immigration and naturalization, Congress regularly makes rules that would be unacceptable if applied to citizens.

[7] The INS relied on *Kleindienst v. Mandel* for the proposition that Price's first amendment rights invoke at most only limited judicial review. [8] Although Price was justified in expecting the greatest degree of constitutional protection afforded a non-citizen, the protection afforded him under the first amendment certainly was not greater than that of the citizen plaintiffs in *Kleindienst*. Thus, the standard of review used in that case was appropriate here.

[9] Applying this limited standard of review to the Attorney General's decision to ask Question 18 was also appropriate because no alien has the slightest right to naturalization unless all statutory requirements are complied with. The burden is on the applicant to show his eligibility in every respect. [10] Because a petitioner might be mistaken about whether an organization is of the type prohibited by section 1424(a) and because Question 18 could reasonably reveal information relevant to other require-

ments for naturalization, the Attorney General's decision that Question 18 is relevant to determining qualification for naturalization was facially legitimate and bona fide.

Dissenting, Judge Noonan stated that Question 18 chills the right of free association guaranteed by the first amendment. Price was invested with the rights guaranteed by the Constitution to all people within the United States. Here, the Immigration Service and the Ninth Circuit had construed the statute in such a way that it is unconstitutional.

COUNSEL

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Lowell V. Sturgill, Jr., Civil Division, United States Department of Justice, Washington, D.C., for the respondent-appellee.

OPINION

BEEZER, Circuit Judge:

John Eric Price appeals the district court's denial of his petition for naturalization. The district court's order was based on Price's refusal to list all organizations with which he has ever been affiliated. Price argues that the Attorney General does not have statutory authority to require him to supply such a list and that such authority would be unconstitutional. We affirm.

I

John Price is a native of England and a citizen of the United Kingdom. He was granted lawful resident alien status in the United States in 1960, and has worked and resided in the United States since then.

On April 21, 1984, Price applied to petition for naturalization. Price answered all questions on the application except Question 18, which reads: "List your present and past membership in or affiliation with every organization, association, fund, foundation,

party, club, society or similar group in the United States or in any other country or place, and your foreign military service. (If none, write 'None.')." In the space provided for an answer to this question, Price wrote "Please see attached statement." The attached statement is a legal brief contending that Question 18 violates Price's First Amendment right of association.

Price answered negatively all parts of Question 19, which asked whether he was or had ever been a member of or associated with the Communist Party, had ever knowingly aided or supported it, or had ever "advocated, taught, believed in, or knowingly supported or furthered the interests of Communism." Additionally, during the course of a preliminary examination before a designated naturalization examiner, Price swore:

> I am not and have not been, within the meaning of the Immigration and Nationality Act, for a period of at least 10 years immediately preceding the date of this petition, a member of or affiliated with any organization proscribed by such Act, or any section, subsidiary, branch, affiliate or subdivision thereof, nor have I during such period believed in, advocated, engaged in, or performed any of the acts or activities prohibited by such Act.

At a Further Preliminary Examination, Price, under oath, reaffirmed his answer to Question 19. When the examiner read the text of Question 18 to him, Price responded that he had not had any foreign military service. He also admitted that he had been a member of "any organization," but he refused to answer any further questions on the subject on the ground that they were

"overbroad" and violated his constitutional rights.[1] Price later swore that he was not consciously thinking of any professional or social organization knowledge of which he intended to keep from the INS.

Price also was given a copy of section 313 of the Immigration and Naturalization Act, 8 U.S.C. § 1424(a), which describes organizations and activities in which participation will bar an alien from being naturalized,[2] and swore that he was not and had never

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[1] Price refused to answer the following questions:

Are you now or have you ever been a member, or are you now affiliated, or have you ever been affiliated with any organization, association, fund, foundation, party, club, society or similar group in the United States or in any other country or place?

. . .

Are you now, or have you ever been, in the United States, a member of any organization in the United States?

. . .

Have you ever been a member of any organizations outside the United States?

. . .

Have you been a member of a political organization in the United States?

. . .

Were you ever a member, outside the United States, of any organization that . . . is or was political?

. . .

Are you now or have you ever been a member of any association, fund, foundation, party, club, society or any similar groups?

. . .

Have you ever been affiliated with any organization, political or nonpolitical, in the United States?

[2] Section 313, 8 U.S.C. § 1424(a) (1988), provides:

> . . . [N]o person shall hereafter be naturalized as a citizen of the United States —
>
> (1) who advocates or teaches, or who is a member of or affiliated with any organization that advocates or teaches, opposition to all organized government; or

(2) who is a member of or affiliated with (A) the Communist Party of the United States; (B) any other totalitarian party of the United States; (C) the Communist Political Association; (D) the Communist or other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state; (E) any section, subsidiary, branch, affiliate, or subdivision of any such association or party; (F) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt; (G) who, regardless of whether he is within any of the other provisions of this section, is a member of or affiliated with any Communist-action organization during the time it is registered or required to be registered under the provisions of section 786 of Title 50; or (H) who, regardless of whether he is within any of the other provisions of this section, is a member of or affiliated with any Communist-front organization during the time it is registered or required to be registered under section 786 or Title 50, unless such alien establishes that he did not have knowledge or reason to believe at the time he became a member of or affiliated with such an organization . . . that such organization was a Communist-front organization; or

(3) who, although not within any of the other provisions of this section, advocates the economic, international, and governmental doctrines of world communism or the establishment in the United States or a totalitarian dictatorship, or who is a member of or affiliated with any organization that advocates the economic, international, and governmental doctrines or world communism or the establishment in the United States of a totalitarian dictatorship, either through its own utterances or through any written or printed publications issued or published by or with the permission or consent of or under authority of such organization or paid for by the funds of such organization; or

(4) who advocates or teaches or who is a member of or affiliated with any organization that advocates or teaches (A) the overthrow by force or violence or other unconstitutional means of the Government of the United States or of all forms of law; or (B) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers . . . of the Government of the United States or of any other organized government because or his or their official character, or (C) the unlawful damage, injury, or destruction of property; or (D) sabotage; or

been a member of or affiliated with any organization mentioned in that section and reaffirmed the averment made at the fast preliminary examination.

On the basis of his refusal to answer Question 18, the district court denied Price's petition for naturalization on the INS's recommendation. On appeal, Price argues that Question 18 exceeds the statutory authority granted the Attorney General by Congress, and that the question violates his First Amendment right to freedom of association.

II

In order to be naturalized, a petitioner must have been a lawfully admitted permanent resident alien, *id.* § 1429 (1988), who has resided in the United States for at least five years prior to the filing of the naturalization petition and for the time between

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(5) who writes or publishes or causes to be written or published, or who knowingly circulates, distributes, prints, or displays, or knowingly causes to be circulated, distributed, printed, published, or displayed, or who knowingly has in his possession for the purpose of circulation, publication, distribution, or display, any written or printed matter, advocating or teaching opposition to all organized government, or advocating (A) the overthrow by force, violence, or other unconstitutional means of the Government of the United States or of all forms of law; or (B) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers . . . of the Government of the United States or of any other organized government, because of his or their official character; or (C) the unlawful damage, injury, or destruction of property; or (D) sabotage; or (E) the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship; or

(6) who is a member of or affiliated with any organization that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue, or display, any written or printed matter of the character described in subparagraph (5) of this subsection.

the filing of his petition and his admission to citizenship, and must have been physically present for at least half of that time. *Id.* § 1427(a)(1), (2). He must also have been "a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States" for five years before the filing of the petition and up to the time of admission to citizenship. *Id.* § 1427(a)(3). Finally, he must not fall into any of the categories described in section 1424(a). *See supra* note 2.

[1] The Immigration and Naturalization Act gives the Attorney General the authority to "prescribe the scope and nature of the examination of petitioners for naturalization as to their admissibility to citizenship." 8 U.S.C. § 1443(a) (1988). The examination of petitioners must be limited to

> inquiry concerning the applicant's residence, physical presence in the United States, good moral character, understanding of and attachment to the fundamental principles of the Constitution of the United States, ability to read, write and speak English, and other qualifications to become a naturalized citizen as required by law.

Id. § 1443(a). Within these limits, the Attorney General has the authority to require an applicant for naturalization to aver to "*all facts which* in the opinion of the Attorney General *may be material to the applicant's naturalization*," *id.* § 1446(a) (emphasis added), and to designate INS employees to take "testimony concerning *any matter touching or in any way affecting* the admissibility of any petitioner for naturalization."*Id.* § 1446(b) (emphasis added). Thus the Attorney General is given very broad authority to make inquiries as long as they are related in some way to the naturalization requirements.

[2] Price contends that by listing in section 1424(a) certain types of organizations whose alien members or affiliates are barred from naturalization, Congress implicitly prohibited the Attorney General from denying naturalization on the basis of association with any other organizations. Therefore, he argues, the broad authority granted the Attorney General to inquire into any matter "touching or in any way affecting" admissibility does not

include inquiry into any other types of organizations. There is, however, no legislative history either supporting or undermining the assumption that section 1424(a) is intended to be an exclusive list.

The INS argues that limiting examination to asking petitioners whether they are members of organizations of the type described in section 1424(a) requires the INS to rely on petitioners' own determinations whether particular organizations are of the prohibited type, rather than allowing the Service to make that determination, and does not address the possibility that a petitioner may wrongly believe that an organization with which he is affiliated does not fall within section 1424(a).

[3] Although section 1424(a) does not appear to require knowledge on the part of the petitioner that the organization is of the type described, we need not resolve that issue here.[3] In at least one circumstance, Congress explicitly gave the Attorney General the responsibility of determining whether a given organization falls within section 1424(a). Section 1424(a)(2)(H) provides that no alien may be naturalized who

> is a member of or affiliated with any Communist-front organization . . . unless such alien establishes that he did not have knowledge *or reason to believe* at the time he became a member of or affiliated with such an organization . . . that such organization was a Communist-front organization.

Id.§ 1424(a)(2)(H) (emphasis added). A petitioner who does not know he is a member of a Communist-front organization would not list that organization in responding to questions regarding 1424(a)-type organizations. However, only by examining all organizations with which the petitioner is affiliated can the Attorney General determine whether the petitioner had "reason to believe" the organization is or was a Communist-front.

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[3] "Meaningful association" with the organization in question has been required in the deportation context, *see Gastelum-Quinones v. Kennedy*, 374 U.S. 469. 477 (1963), and in the context of petitions for adjustment of status. *See Firestone v. Howerton*, 671 F.2d 317 (9th Cir. 1982).

[4] The INS also argues that membership in types of organizations not described in section 1424(a) may be relevant to other requirements of naturalization such as duration of residence, good moral character or being "well disposed to the good order and happiness of the United States." "The government is entitled to know of any facts that may bear on an applicant's statutory eligibility for citizenship, so it may pursue leads and make further investigation if doubts are raised." *Berenyi v. District Director, INS.* 385 U.S. 630, 638 (1967). It is completely reasonable to assume that knowing the organizations with which a petitioner is associated will be relevant to one or more of the requirements for citizenship. Furthermore, because "INS officials must exercise especially sensitive political functions that implicate questions of foreign relations, . . . the reasons for giving deference to agency decisions . . . in other administrative contexts apply with even greater force in the INS context." *INS v. Abudu,* 485 U.S. 94, 110 (1988) (footnotes omitted) (affirming the Board of Immigration Appeals' denial of a motion to reopen deportation hearings). Question 18 does not exceed the broad authority given the Attorney General to implement the naturalization statutes.

III

[5] "[A]n alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative." *Landon v. Plasencia.* 459 U.S. 21, 32 (1982). However, "once an alien gains admission to our country and begins to develop ties that go with permanent residence, his constitutional status changes accordingly." *Id.* It has long been recognized that resident aliens enjoy the protections of the First Amendment. *See Kwong Hai Chew v. Colding,* 344 U.S. 590, 596 n.5 (1953) (quoting *Bridges v. Wixon,* 326 U.S. 135, 161 (1945) (Murphy, J., concurring)); *Hellenic Lines, Ltd. v. Rhoditis,* 398 U.S. 306, 309 n.5 (1970) (same quotation); *United States v. Verdugo-Urquidez,* 856 F.2d 1214, 1222 (9th Cir. 1988), *rev'd on other grounds,* 110 S. Ct. 1056 (1990).

[6] However, the protection afforded resident aliens may be limited. The Supreme Court recently stated that the cases estab-

lishing constitutional protection for aliens within the territory of the United States "are constitutional decisions of this Court expressly according differing protection to aliens than to citizens, based on our conclusion that the particular provisions in question were not intended to extend to aliens in the same degree as to citizens." *United States v. Verdugo-Urquidez.* 110 S. Ct. 1056, 1064, 1065 (1990) (citations omitted). Additionally, the Court has historically afforded Congress great deference in the area of immigration and naturalization.

> Over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens. . . . Our cases have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control. . . . [S]ince decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary, and [t]he reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization.

Fiallo v. Bell, 430 U.S. 787, 792, 796 (1977) (quotations omitted). "[I]n the exercise of its broad power over immigration and naturalization, 'Congress regularly makes rules that would be unacceptable if applied to citizens.' " *Id.* at 792 (quoting *Mathews v. Diaz,* 426 U.S. 67, 80 (1976)).[4]

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[4] Commentators have noted that "to say that Congress has all the immigration power it could be granted is not to say that the exercise of the power is free of limits established elsewhere in the Constitution . . . . [T]he immigration power does not stand above or before the Constitution. . . . Accordingly, immigration regulations ought to be subject to the judicial scrutiny accorded other exercises of federal power." *See* Aleinikoff, *Federal Regulation of Aliens and the Constitution,* 83 Am. J. Int'l L. 862, 866 (1989); *see also Carlson v. Landon,* 342 U.S. 524, 537

[7] The INS relies on *Kleindienst v. Mandel,* 408 U.S. 753 (1972) for the proposition that Price's first amendment rights invoke at most only limited judicial review. In *Kleindienst,* the INS denied a nonimmigrant visa to a Belgian author on the basis of his Marxist writings. Several U.S. citizen scholars argued that this decision violated their first amendment rights to receive information and ideas. Id. at 760. The Court agreed that first amendment rights of citizens were implicated, id. at 765, but held that

> when the executive exercises this [exclusion] power negatively on the basis of a *facially legitimate and bona fide reason,* the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant.

Id. at 770 (emphasis added).

[8] Price argues that because *Kleindienst* involved exclusion rather than naturalization, it does not control his case. However, the determination of who will become a citizen of the United States is at least as "peculiarly concerned with the political conduct of government," *Galvan v. Press.* 347 U.S. 522, 531 (1954), as the decision of who will be allowed to enter, if not more so. While a resident alien may not participate in the process of governing the country, naturalized citizens may. Naturalization

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(1952) ("The power to expel aliens . . . is, of course, subject to judicial intervention under the 'paramount law of the Constitution.' "). However, the Supreme Court has recognized that it is not "writing on a clean slate. . . . As to the extent of the power of Congress under review, there is not merely 'a page of history' . . . but a whole volume. Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. . . . But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government."

Fiallo, 430 U.S. at 792-93 n.4 (quoting *Galvan v. Press,* 347 U.S. 522, 530-32 (1954)).

decisions, therefore, deserve at least as much judicial deference as do decisions about initial admission.[5] Furthermore, although Price is justified in expecting the greatest degree of constitutional protection afforded a non-citizen,[6] the protection afforded him under the First Amendment certainly is not greater than that of the citizen plaintiffs in Kleindienst. For these reasons, the *Kleindienst* standard is appropriate in this case.

Price argues that he is not challenging the political decision underlying the determination of the substantive requirements for naturalization, but that he challenges instead the method of inquiry, which, in the case of Question 18, chills his freedom of association. Because of this posture, he contends, greater judicial scrutiny is appropriate.

A similar claim was rejected in *Kleindienst.* Congress had authorized the Attorney General to waive the ineligibility of aliens for temporary admission where appropriate " 'for humane reasons and for reasons of public interest.' " 408 U.S. at 767 (citation omitted). The citizen plaintiffs argued that the implementation of the Attorney General's decision "must be limited by [their] First Amendment rights." *Id.* The Court applied only limited judicial scrutiny and held that the requirements of the First Amendment were met because the reasons for refusing to

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[5] The importance of the naturalization process was the basis for the district court's alternative holding that even under a more demanding First Amendment analysis, the government has a compelling interest in asking questions such as Question 18 that outweighs any First Amendment right a petitioner for naturalization may have.

[6] An alien is

> accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization.

Johnson v. Eisentrager. 339 U.S. 763, 771 (1950); *see also Verdugo-Urquidez,* 110 S. Ct. at 1063.

grant the waiver were "facially legitimate and bona fide." *Id.* at 769.

[9] Applying this limited standard of review to the Attorney General's decision to ask Question 18 is also appropriate because "[n]o alien has the slightest right to naturalization unless all statutory requirements are complied with." *See Fedorenko v. United States,* 449 U.S. 490, 506 (1981). Additionally, "the burden is on the applicant to show his eligibility in every respect." *See Berenyi.* 385 U.S. at 637.[7]

Price looks for support to *Girouard v. United States,* 328 U.S. 61 (1946), in which the Supreme Court held that the statutory requirement that a petitioner for naturalization swear his willingness to "support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic" could not be read to require a petitioner to swear to "take up arms in defense of this country." Although the Court did look to First Amendment principles in reaching its conclusion, *see id.* at 68, the requirement in *Girouard* is different from that at issue here.

In *Girouard,* the alien was required to make a commitment that would last beyond his naturalization, despite the fact that natural-born citizens with the same religious objections to bearing

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[7] In deportation hearings, the government must prove its case by "clear, unequivocal and convincing evidence." *Berenyi,* 385 U.S. at 636 (quotation omitted). The fact that the alien carries the burden in naturalization proceedings helps to explain why, despite the sliding-scale theory of alien rights, *see supra* note 6, aliens at naturalization are not necessarily entitled to the full protection of the First Amendment arguably afforded in deportation hearings. *See Harisiades v. Shaughnessy,* 342 U.S. 580, 592 (1952) (upholding the deportation of a member of the Communist Party under the then-applicable First Amendment test); *Parchum v. INS,* 769 F.2d 1001, 1005-06 (4th Cir. 1985) (First Amendment protection applies in a deportation hearing); *American-Arab Anti-Discrimination Committee v. Meese,* 714 F. Supp. 1060 (C.D. Cal. 1989) (same). Further support for this result is found in the fact that admission of an alien to citizenship is at least as fundamental to the identity of the nation as is the initial decision of whom to admit.

arms could avoid doing so by seeking conscientious objector status. Furthermore, the naturalized alien who sought conscientious objector status might be subject to denaturalization for having procured citizenship through willful misrepresentation. *See* 8 U.S.C. § 1451(a) (1988). The present case is different. Although a resident alien desiring eventually to petition for naturalization may find himself choosing between future citizenship and association with groups whose affiliation he does not wish to disclose, once naturalized he is afforded precisely the same protection of his right to associate as is a natural born citizen.[8]

[10] Because a petitioner might be mistaken about whether an organization is of the type prohibited by section 1424(a) and because Question 18 could reasonably reveal information relevant to other requirements for naturalization, the Attorney General's decision that Question 18 is relevant to determining qualification for naturalization is facially legitimate and bona fide.

The district court's denial of Price's petition for naturalization is AFFIRMED.

NOONAN, Circuit Judge, dissenting:

The Immigration Service propounds a question to persons seeking naturalization that would be intolerable if asked by a government agency of an American citizen. It is an intimidating question. It chills the right of free association guaranteed by the First Amendment.

The Immigration Service's answer is that aliens are different. They are second class people. No doubt for some purposes this characterization is the harsh truth. Since the abolition of slavery aliens are the only adults subject to treatment as second class people in the United States.

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[8] Although affiliation within five years of naturalization with an organization with which prior affiliation would have been a bar to naturalization is *prima facie* evidence that naturalization was obtained by willful misrepresentation, *see* 8 U.S.C. § 1451(c) (1988), this evidence will only result in denaturalization "in the absence of countervailing evidence." *Id.* This fact does not, therefore, chill association that legitimately arises after naturalization.

The Supreme Court has taken some steps to remedy the aliens' plight when their ill treatment comes from the states. *Mathews v. Diaz,* 426 U.S. 67 (1976); *Talley v. California,* 362 U.S. 60 (1960). However, the Supreme Court has used language giving great deference to Congress over the admission of aliens. *Fiallo v. Bell,* 430 U.S. 787, 792 (1977). This deference is defensible when the alien is outside the United States and seeking to enter this country. *Kleindienst v. Mandel,* 408 U.S. 753 (1972). It is also appropriate to give deference to Congress and the Executive Branch in matters which "may implicate our relations with foreign powers." Fiallo, 430 U.S. at 796 (quoting *Mathews v. Diaz,* 426 U.S. at 81-82).

The case, however, is substantially different when the alien is a resident and a resident of long standing — in the present case 30 years. Realistically such a person has been conducting himself like an American for a very long time. His reactions to an intolerable inquiry are similar to those of a citizen. Rightly so. He has imbibed the air of freedom which permeates our culture. He insists upon a right not to be treated as a second class person where freedom of association is concerned.

The Supreme Court has drawn a firm line between resident and nonresident aliens. In this case the court relies principally on *Kleindienst v. Mandel, supra.* But Mandel was a revolutionary Marxist from Belgium seeking to enter this country. All precedent was against the judiciary ordering his admission. As Justice Murphy had put it, "The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores." *Bridges v. Wixon,* 326 U.S. 135, 161 (1945). Justice Murphy had, however, continued: "Once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders." Justice Murphy's views, expressed as a concurrence, were adopted by a unanimous court in *Kwong Hai Chu v. Colding,* 344 U.S. 590, 596 n.4 (1953). They have recently been quoted and endorsed by Chief Justice Rehnquist writing for the Court in *United States v. Verdugo-Urquidez,* 110 S. Ct. 1056, 1064 (1990). Indeed, Chief Justice Rehnquist italicized the words "*once an alien lawfully enters and resides in this country.*" Price lawfully entered the

country and resides here. He is "invested with the rights guaranteed by the Constitution to all people within our borders."

The power of Congress to set standards for naturalization is very large, but like every other power of government it is circumscribed; it is not absolute. In *Girouard v. United States,* 328 U.S. 61 (1946), the Court refused to construe as mandatory a requirement made by Congress that a petitioner for naturalization swear to support the Constitution by taking up arms in defense of this country. The Court did so because otherwise the statute would have been held as unconstitutional. *Girouard,* 328 U.S. at 65.

In the present case the Immigration Service and this court have construed the statute in such a way that it is unconstitutional. As construed, the statute permits the Immigration Service to undertake an inquiry far broader than any governmental necessity warrants. The Immigration Service draws to our attention Executive Order 11785 (June 4, 1974) forbidding it to maintain a list of subversive organizations. The Immigration Service may not maintain such a list but under its interpretation of its authority it may snoop into any and all organizations a resident alien has joined.

A narrowly tailored question could be asked of any petitioner without infringing on First Amendment rights. A petitioner could be asked if he had belonged to any organizations dedicated to the overthrow of the government or advocating or using terrorism or if he belonged to any foreign military, paramilitary or intelligence organization. Such a question would have an obvious relevance to government's legitimate concerns. A question without bounds as to association has no relation to governmental concerns.

The Immigration Service says that the government is concerned with the petitioner's "character." Beyond excluding persons committed to subversion or terror or under the orders of a foreign government, there is no conceivable way that the government can measure a person's character. Persons of all kinds of character make up the United States. The Immigration Service cannot design some fine test by which only persons of outstanding character will be admitted as citizens. In reality we must take our applicants for citizens, as we take our citizens themselves, as a

mix of people. That is the way immigrants have come to the United States and peopled it and that is the way it will always be.

The statute is without rational purpose and, infringing severely on the right of free association, it is unconstitutional. I respectfully dissent.

FOR PUBLICATION

United States Court of Appeals

For The Ninth Circuit

No. 89-16457
D.C. No. PET-21298-WAI

JOHN ERIC PRICE,
Petitioner-Appellant,

v.

UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE,
Respondent-Appellee.

ORDER AND OPINION

Appeal from the United States District Court
for the Northern District of California
William A. Ingram, Chief Judge, Presiding

Argued and Submitted
March 14, 1991 — San Francisco, California

Opinion Filed August 7, 1991
Opinion Withdrawn April 20, 1992
Order and Opinion Filed April 20, 1992

Before: Robert R. Beezer and John T. Noonan, Circuit Judges and James K. Singleton,* District Judge

Opinion by Judge Beezer; Dissent by Judge Noonan

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* The Honorable James K. Singleton, United States District Judge for the District of Alaska, sitting by designation.

SUMMARY

Immigration/Citizenship

Affirming a district court judgment denying appellant's petition for naturalization, the court of appeals held that the Attorney General has the statutory authority to require naturalization applicants to list all organizations with which the applicant has even been affiliated without violating the first amendment.

The INS denied appellant John Eric Price's petition for naturalization for his refusal to list all organizations with which he has ever been affiliated. The district court affirmed. Price argued that the Attorney General did not have statutory authority to require him to supply such a list and that such authority would be unconstitutional.

[1] The Attorney General is given very broad authority to make inquiries as long as they are related in some way to the naturalization requirements. [2] Only by examining all organizations with which the petitioner is affiliated can the Attorney General determine whether the petitioner had reason to believe the organization is or was a Communist front. [3] It was completely reasonable to assume that knowing the organizations with which a petitioner was associated will be relevant to one or more of the requirements for citizenship. [4] Naturalization decisions deserved at least as much judicial deference as those about initial admission. [5] No alien has the slightest right to naturalization unless all statutory requirements are complied with. [6] Thus, because a petitioner might be mistaken about whether an organization is of the type prohibited by section 1424(a) and because Question 18 could reasonably reveal information relevant to other requirements for naturalization, the Attorney General's decision that Question 18 is relevant to determining qualification for naturalization was facially legitimate, bona fide and not in violation of Price's first amendment right to freedom of association.

Judge Noonan dissented, stating that the Immigration Service propounds a question to persons seeking naturalization that would be intolerable if asked by a government agency of an American

citizen, thus chilling the right of free association guaranteed by the first amendment.

COUNSEL

Kai H. Wessels, Gonsalves & Kozachenko, Fremont, California, Barbara R. Shufro and Edward V. Anderson, Pillsbury, Madison & Sutro, San Jose, California, for the petitioner-appellant.

Lowell V. Sturgill, Jr., United States Department of Justice, Washington, D.C., for the respondent-appellee.

ORDER

The full court has been advised of the suggestion for rehearing en banc. Judge Beezer rejected the suggestion for rehearing en banc and Judge Singleton recommended rejection. Judge Noonan approved the suggestion for rehearing en banc. An active judge called for a vote on the suggestion and a majority of active judges voted not to rehear the matter en banc. The panel resumed control of the case February 25, 1992.

The panel has unanimously voted to grant the petition for rehearing. The opinion filed August 7, 1991 is withdrawn. A new opinion is filed herewith and the clerk shall issue the mandate forthwith.

OPINION

BEEZER, Circuit Judge:

John Eric Price appeals the district court's denial of his petition for naturalization. The district court's order was based on Price's refusal to list all organizations with which he has ever been affiliated. Price argues that the Attorney General does not have statutory authority to require him to supply such a list and that such authority would be unconstitutional. We affirm.

I

John Price is a native of England and a citizen of the United Kingdom. He was granted lawful resident alien status in the United States in 1960, and has worked and resided in the United States since then.

On April 21, 1984, Price applied to petition for naturalization. Price answered all questions on the application except Question 18, which reads: "List your present and past membership in or affiliation with every organization, association, fund, foundation, party, club, society or similar group in the United States or in any other country or place, and your foreign military service. (If none, write 'None.')." In the space provided for an answer to this question, Price wrote "Please see attached statement." The attached statement is a legal brief contending that Question 18 violates Price's First Amendment right of association.

Price answered negatively all parts of Question 19, which asked whether he was or had ever been a member of or associated with the Communist Party, had ever knowingly aided or supported it, or had ever "advocated, taught, believed in, or knowingly supported or furthered the interests of Communism." Additionally, during the course of a preliminary examination before a designated naturalization examiner, Price swore:

> I am not and have not been, within the meaning of the Immigration and Nationality Act, for a period of at least 10 years immediately preceding the date of this petition, a member of or affiliated with any organization proscribed by such Act, or any section, subsidiary, branch, affiliate or subdivision thereof, nor have I during such period believed in, advocated, engaged in, or performed any of the acts or activities prohibited by such Act.

At a Further Preliminary Examination, Price, under oath, reaffirmed his answer to Question 19. When the examiner read the text of Question 18 to him, Price responded that he had not had any foreign military service. He also admitted that he had been a member of "any organization," but he refused to answer any further questions on the subject on the ground that they were

"overbroad" and violated his constitutional rights.[1] Price later swore that he was not consciously thinking of any professional or social organization knowledge of which he intended to keep from the INS.

Price also was given a copy of section 313 of the Immigration and Naturalization Act, 8 U.S.C. § 1424(a), which describes

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[1] Price refused to answer the following questions:

> Are you now or have you ever been a member. or are you now affiliated, or have you ever been affiliated with any organization, association, fund, foundation, party, club, society or similar group in the United States or in any other country or place?
>
> . . .
>
> Are you now, or have you ever been, in the United States, a member of any organization in the United States?
>
> . . .
>
> Have you ever been a member of any organizations outside the United States?
>
> . . .
>
> Have you been a member of a political organization in the United States?
>
> . . .
>
> Were you ever a member, outside the United States, of any organization that . . . is or was political?
>
> . . .
>
> Are you now or have you ever been a member of any association, fund, foundation, party, club, society or any similar groups?
>
> . . .
>
> Have you ever been affiliated with any organization, political or nonpolitical, in the United States?

organizations and activities in which participation will bar an alien from being naturalized,[2] and swore that he was not and had never been a member of or affiliated with any organization mentioned in

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[2] Section 313, 8 U.S.C. § 1424(a) (1988), provides:

> . . . [N]o person shall hereafter be naturalized as a citizen of the United States —
>
> (1) who advocates or teaches, or who is a member of or affiliated with any organization that advocates or teaches, opposition to all organized government; or
>
> (2) who is a member of or affiliated with (A) the Communist Party of the United States; (B) any other totalitarian party of the United States; (C) the Communist Political Association; (D) the Communist or other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state; (E) any section, subsidiary, branch, affiliate, or subdivision of any such association or party; (F) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt; (G) who, regardless of whether he is within any of the other provisions of this section, is a member of or affiliated with any Communist-action organization during the time it is registered or required to be registered under the provisions of section 786 of Title 50; or (H) who, regardless of whether he is within any of the other provisions of this section, is a member of or affiliated with any Communist-front organization during the time it is registered or required to be registered under section 786 or Title 50, unless such alien establishes that he did not have knowledge or reason to believe at the time he became a member of or affiliated with such an organization . . . that such organization was a Communist-front organization; or
>
> (3) who, although not within any of the other provisions of this section, advocates the economic, international, and governmental doctrines of world communism or the establishment in the United States or a totalitarian dictatorship, or who is a member of or affiliated with any organization that advocates the economic, international, and governmental doctrines or world communism or the establishment in the United States of a totalitarian dictatorship, either through its own utterances or through any written or printed publications issued or published by or with the permission or

that section and reaffirmed the averment made at the first preliminary examination.

On the basis of his refusal to answer Question 18, the district court denied Price's petition for naturalization on the INS's recommendation. On appeal, Price argues that Question 18 exceeds the statutory authority granted the Attorney General by

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consent of or under authority of such organization or paid for by the funds of such organization; or

(4) who advocates or teaches or who is a member of or affiliated with any organization that advocates or teaches (A) the overthrow by force or violence or other unconstitutional means of the Government of the United States or of all forms of law; or (B) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers . . . of the Government of the United States or of any other organized government because or his or their official character, or (C) the unlawful damage, injury, or destruction of property; or (D) sabotage; or

(5) who writes or publishes or causes to be written or published, or who knowingly circulates, distributes, prints, or displays, or knowingly causes to be circulated, distributed, printed, published, or displayed, or who knowingly has in his possession for the purpose of circulation, publication, distribution, or display, any written or printed matter, advocating or teaching opposition to all organized government, or advocating (A) the overthrow by force, violence, or other unconstitutional means of the Government of the United States or of all forms of law; or (B) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers . . . of the Government of the United States or of any other organized government, because of his or their official character; or (C) the unlawful damage, injury, or destruction of property; or (D) sabotage; or (E) the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship; or

(6) who is a member of or affiliated with any organization that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the propose of circulation, distribution, publication, issue, or display, any written or printed matter of the character described in subparagraph (5) of this subsection.

Congress, and that the question violates his First Amendment right to freedom of association.

II

In order to be naturalized, a petitioner must have been a lawfully admitted permanent resident alien, *id.* § 1429 (1988), who has resided in the United States for at least five years prior to the filing of the naturalization petition and for the time between the filing of his petition and his admission to citizenship, and must have been physically present for at least half of that time. *Id.* § 1427(a)(1), (2). He must also have been "a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States" for five years before the filing of the petition and up to the time of admission to citizenship. *Id.* § 1427(a)(3). Finally, he must not fall into any of the categories described in section 1424(a). *See supra* note 2.

[1] The Immigration and Naturalization Act gives the Attorney General the authority to "prescribe the scope and nature of the examination of petitioners for naturalization as to their admissibility to citizenship." 8 U.S.C. § 1443(a) (1988). The examination of petitioners must be limited to

> inquiry concerning the applicant's residence, physical presence in the United States, good moral character, understanding of and attachment to the fundamental principles of the Constitution of the United States, ability to read, write and speak English, and other qualifications to become a naturalized citizen as required by law.

Id. § 1443(a). Within these limits, the Attorney General has the authority to require an applicant for naturalization to aver to "*all facts which* in the opinion of the Attorney General *may be material to the applicant's naturalization,*" *id.* § 1446(a) (emphasis added), and to designate INS employees to take "testimony concerning *any matter touching or in any way affecting* the admissibility of any petitioner for naturalization." *Id.* § 1446(b) (emphasis added). Thus the Attorney General is given very broad

authority to make inquiries as long as they are related in some way to the naturalization requirements.

Price contends that by listing in section 1424(a) certain types of organizations whose alien members or affiliates are barred from naturalization, Congress implicitly prohibited the Attorney General from denying naturalization on the basis of association with any other organizations. Therefore, he argues, the broad authority granted the Attorney General to inquire into any matter "touching or in any way affecting" admissibility does not include inquiry into any other types of organizations. There is, however, no legislative history either supporting or undermining the assumption that section 1424(a) is intended to be an exclusive list.

The INS argues that limiting examination to asking petitioners whether they are members of organizations of the type described in section 1424(a) requires the INS to rely on petitioners' own determinations whether particular organizations are of the prohibited type, rather than allowing the Service to make that determination, and does not address the possibility that a petitioner may wrongly believe that an organization with which he is affiliated does not fall within section 1424(a).

[2] Although section 1424(a) does not appear to require knowledge on the part of the petitioner that the organization is of the type described, we need not resolve that issue here.[3] In at least one circumstance, Congress explicitly gave the Attorney General the responsibility of determining whether a given organization falls within section 1424(a). Section 1424(a)(2)(H) provides that no alien may be naturalized who

> is a member of or affiliated with any Communist-front organization . . . unless such alien establishes that he did not have knowledge *or reason to believe* at the time he became a member of or affiliated with such an organization . . . that such organization was a Communist-front organization.

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[3] "Meaningful association" with the organization in question has been required in the deportation context, *see Gastelum-Quinones v. Kennedy*, 374 U.S. 469, 477 (1963), and in the context of petitions for adjustment of status. *See Firestone v. Howerton*, 671 F.2d 317 (9th Cir. 1982).

Id. § 1424(a)(2)(H) (emphasis added). A petitioner who does not know he is a member of a Communist-front organization would not list that organization in responding to questions regarding 1424(a)-type organizations. However, only by examining all organizations with which the petitioner is affiliated can the Attorney General determine whether the petitioner had "reason to believe" the organization is or was a Communist-front.

[3] The INS also argues that membership in types of organizations not described in section 1424(a) may be relevant to other requirements of naturalization such as duration of residence, good moral character or being "well disposed to the good order and happiness of the United States." "The government is entitled to know of any facts that may bear on an applicant's statutory eligibility for citizenship, so it may pursue leads and make further investigation if doubts are raised." *Berenyi v. District Director, INS,* 385 U.S. 630, 638 (1967). It is completely reasonable to assume that knowing the organizations with which a petitioner is associated will be relevant to one or more of the requirements for citizenship. Furthermore, because "INS officials must exercise especially sensitive political functions that implicate questions of foreign relations, . . . the reasons for giving deference to agency decisions . . . in other administrative contexts apply with even greater force in the INS context." *INS v. Abudu,* 485 U.S. 94, 110 (1988) (footnotes omitted) (affirming the Board of Immigration Appeals' denial of a motion to reopen deportation hearings). Question 18 does not exceed the broad authority given the Attorney General to implement the naturalization statutes.

III

"[A]n alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative." *Landon v. Plasencia,* 459 U.S. 21, 32 (1982). However, "once an alien gains admission to our country and begins to develop ties that go with permanent residence, his constitutional status changes accordingly." *Id.* It has long been recognized that resident aliens enjoy the protections of the First Amendment. *See Kwong Hai Chew v. Colding,* 344 U.S. 590, 596

n.5 (1953) (quoting *Bridges v. Wixon,* 326 U.S. 135, 161 (1945) (Murphy, J., concurring)); *Hellenic Lines, Ltd. v. Rhoditis,* 398 U.S. 306, 309 n.5 (1970) (same quotation); *United States v. Verdugo-Urquidez,* 856 F.2d 1214, 1222 (9th Cir. 1988), *rev'd on other grounds,* 110 S. Ct. 1056 (1990).

However, the protection afforded resident aliens may be limited. The Supreme Court recently stated that the cases establishing constitutional protection for aliens within the territory of the United States "are constitutional decisions of this Court expressly according differing protection to aliens than to citizens, based on our conclusion that the particular provisions in question were not intended to extend to aliens in the same degree as to citizens." *United States v. Verdugo-Urquidez,* 110 S. Ct. 1056, 1064, 1065 (1990) (citations omitted). Additionally, the Court has historically afforded Congress great deference in the area of immigration and naturalization.

> Over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens . . . . Our cases have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control . . . . [S]ince decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary, and [t]he reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization.

Fiallo v. Bell, 430 U.S. 787, 792, 796 (1977) (quotations omitted). "[I]n the exercise of its broad power over immigration and naturalization, 'Congress regularly makes rules that would be

unacceptable if applied to citizens.' " *Id.* at 792 (quoting *Mathews v. Diaz,* 426 U.S. 67, 80 (1976)).[4]

The INS relies on *Kleindienst v. Mandel,* 408 U.S. 753 (1972) for the proposition that Price's first amendment rights invoke at most only limited judicial review. In *Kleindienst,* the INS denied a nonimmigrant visa to a Belgian author on the basis of his Marxist writings. Several U.S. citizen scholars argued that this decision violated their first amendment rights to receive information and ideas. *Id.* at 760. The Court agreed that first amendment rights of citizens were implicated, *id.* at 765, but held that

> when the executive exercises this [exclusion] power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification

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[4] Commentators have noted that "to say that Congress has all the immigration power it could be granted is not to say that the exercise of the power is free of limits established elsewhere in the Constitution. . . . [T]he immigration power does not stand above or before the Constitution. . . . Accordingly, immigration regulations ought to be subject to the judicial scrutiny accorded other exercises of federal power." *See* Aleinikoff, *Federal Regulation of Aliens and the Constitution,* 83 Am. J. Int'l L. 862, 866 (1989); *see also Carlson v. Landon,* 342 U.S. 524, 537 (1952) ("The power to expel aliens . . . is, of course, subject to judicial intervention under the 'paramount law of the Constitution.' "). However, the Supreme Court has recognized that it is not

> "writing on a clean slate. . . . As to the extent of the power of Congress under review, there is not merely 'a page of history' . . . but a whole volume. Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. . . . But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government."

Fiallo, 430 U.S. at 792-93 n.4 (quoting *Galvan v. Press,* 347 U.S. 522, 530-32 (1954)).

> against the First Amendment interests of those who seek personal communication with the applicant.

Id. at 770 (emphasis added).

[4] Price argues that because *Kleindienst* involved exclusion rather than naturalization, it does not control his case. However, the determination of who will become a citizen of the United States is at least as "peculiarly concerned with the political conduct of government," *Galvan v. Press,* 347 U.S. 522, 531 (1954), as the decision of who will be allowed to enter, if not more so. While a resident alien may not participate in the process of governing the country, naturalized citizens may. Naturalization decisions, therefore, deserve at least as much judicial deference as do decisions about initial admission.[5] Furthermore, although Price is justified in expecting the greatest degree of constitutional protection afforded a non-citizen,[6] the protection afforded him under the First Amendment certainly is not greater than that of the citizen plaintiffs in *Kleindienst.* For these reasons, the *Kleindienst* standard is appropriate in this case.

Price argues that he is not challenging the political decision underlying the determination of the substantive requirements for naturalization, but that he challenges instead the method of inquiry, which, in the case of Question 18, chills his freedom of

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[5] The importance of the naturalization process was the basis for the district court's alternative holding that even under a more demanding First Amendment analysis, the government has a compelling interest in asking questions such as Question 18 that outweighs any First Amendment right a petitioner for naturalization may have.

[6] An alien is

> accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization.

Johnson v. Eisentrager, 339 U.S. 763, 771 (1950); *see also Verdugo-Urquidez,* 110 S. Ct. at 1063.

association. Because of this posture, he contends, greater judicial scrutiny is appropriate.

A similar claim was rejected in *Kleindienst.* Congress had authorized the Attorney General to waive the ineligibility of aliens for temporary admission where appropriate " 'for humane reasons and for reasons of public interest.' " 408 U.S. at 767 (citation omitted). The citizen plaintiffs argued that the implementation of the Attorney General's decision "must be limited by [their] First Amendment rights." *Id.* The Court applied only limited judicial scrutiny and held that the requirements of the First Amendment were met because the reasons for refusing to grant the waiver were "facially legitimate and bona fide." *Id.* at 769.

[5] Applying this limited standard of review to the Attorney General's decision to ask Question 18 is also appropriate because "[n]o alien has the slightest right to naturalization unless all statutory requirements are complied with." *See Fedorenko v. United States,* 449 U.S. 490, 506 (1981). Additionally, "the burden is on the applicant to show his eligibility in every respect." *See Berenyi,* 385 U.S. at 637.[7]

Price looks for support to *Girouard v. United States,* 328 U.S. 61 (1946), in which the Supreme Court overruled existing

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[7] In deportation hearings, the government must prove its case by "clear, unequivocal and convincing evidence." *Berenyi,* 385 U.S. at 636 (quotation omitted). The fact that the alien carries the burden in naturalization proceedings helps to explain why, despite the sliding-scale theory of alien rights, *see supra* note 6, aliens at naturalization are not necessarily entitled to the full protection of the First Amendment arguably afforded in deportation hearings. *See Harisiades v. Shaughnessy,* 342 U.S. 580, 592 (1952) (upholding the deportation of a member of the Communist Party under the then-applicable First Amendment test); *Parchum v. INS,* 769 F.2d 1001, 1005-06 (4th Cir. 1985) (First Amendment protection applies in a deportation hearing); *American-Arab Anti-Discrimination Committee v. Meese,* 714 F. Supp. 1060 (C.D. Cal. 1989) (same). Further support for this result is found in the fact that admission of an alien to citizenship is at least as fundamental to the identity of the nation as is the initial decision of whom to admit.

precedent and held that the statutory requirement that a petitioner for naturalization swear his willingness to "support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic" could not be read to require a petitioner to swear to "take up arms in defense of this country." The Court noted that Congress had traditionally shown great deference to First Amendment principles in defining the scope of the phrase "support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic." *Id.* at 68-69. It grounded its holding in principles of statutory construction, however, observing that the same oath had a different meaning in other circumstances, that Congress otherwise had exhibited a policy of religious tolerance in allowing noncombatant military service and that noncombatants who had already served could take the same oath.

Price looks to *Girouard* for support of a First Amendment claim, not for support of the proposition that the INS has misconstrued its statutory authority.[8] We think that the thoughtful dissent of Chief Justice Stone[9] lays to rest any notion that the Court decided *Girouard* on First Amendment grounds.

> No question of the constitutional power of Congress to withhold citizenship on these grounds was involved. That power was not doubted. The only question was of construction of the statute which Congress at all times has been free to amend if dissatisfied with the construction adopted by the Court.
>
> . . . A study of Congressional action taken with respect to proposals for amendment of the naturalization laws since the decision in the Schwimmer case, leads me to conclude that Congress has adopted and confirmed this Court's earlier

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[8] We explained *supra* Part II that Question 18 did not exceed the broad authority given the Attorney General to implement the naturalization statutes.

[9] In two of the three cases overruled by the majority, which two cases presented issues of first impression, the Chief Justice advanced the majority's arguments in dissent.

> construction of the naturalization laws. For that reason alone I think that the judgment should be affirmed.

Id. at 72-73 (Stone, C.J., joined by Reed and Frankfurter, JJ., dissenting) (citations omitted). In fact, the critical analysis in the majority opinion addresses the Court's freedom to overrule its precedents in the face of congressional inaction that could be characterized as adoption of the Court's earlier rulings. *Id.* at 69-70. Price finds no support for his First Amendment argument in *Girouard.*

[6] Because a petitioner might be mistaken about whether an organization is of the type prohibited by section 1424(a) and because Question 18 could reasonably reveal information relevant to other requirements for naturalization, the Attorney General's decision that Question 18 is relevant to determining qualification for naturalization is facially legitimate and bona fide.

The district court's denial of Price's petition for naturalization is AFFIRMED.

NOONAN, Circuit Judge, dissenting:

The Immigration Service propounds a question to persons seeking naturalization that would be intolerable if asked by a government agency of an American citizen. It is an intimidating question. It chills the right of free association guaranteed by the First Amendment.

The Immigration Service's answer is that aliens are different. They are second class people. No doubt for some purposes this characterization is the harsh truth. Since the abolition of slavery aliens are the only adults subject to treatment as second class people in the United States.

The Supreme Court has taken some steps to remedy the aliens' plight when their ill treatment comes from the states. *Mathews v. Diaz,* 426 U.S. 67 (1976); *Talley v. California,* 362 U.S. 60 (1960). However, the Supreme Court has used language giving great deference to Congress over the admission of aliens. *Fiallo v. Bell,* 430 U.S. 787, 792 (1977). This deference is defensible when the alien is outside the United States and seeking to enter this

country. *Kleindienst v. Mandel,* 408 U.S. 753 (1972). It is also appropriate to give deference to Congress and the Executive Branch in matters which "may implicate our relations with foreign powers." *Fiallo,* 430 U.S. at 796 (quoting *Mathews v. Diaz,* 426 U.S. at 81-82).

The case, however, is substantially different when the alien is a resident and a resident of long standing — in the present case 30 years. Realistically such a person has been conducting himself like an American for a very long time. His reactions to an intolerable inquiry are similar to those of a citizen. Rightly so. He has imbibed the air of freedom which permeates our culture. He insists upon a right not to be treated as a second class person where freedom of association is concerned.

The Supreme Court has drawn a firm line between resident and nonresident aliens. In this case the court relies principally on *Kleindienst v. Mandel, supra.* But Mandel was a revolutionary Marxist from Belgium seeking to enter this country. All precedent was against the judiciary ordering his admission. As Justice Murphy had put it, "The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores." *Bridges v. Wixon,* 326 U.S. 135, 161 (1945). Justice Murphy had, however, continued: "Once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders." Justice Murphy's views, expressed as a concurrence, were adopted by a unanimous court in *Kwang Hai Chu v. Colding,* 344 U.S. 590, 596 n.4 (1953). They have recently been quoted and endorsed by Chief Justice Rehnquist writing for the Court in *United States v. Verdugo-Urquidez,* 110 S.Ct. 1056, 1064 (1990). Indeed, Chief Justice Rehnquist italicized the words "*once an alien lawfully enters and resides in this country.*" Price lawfully entered the country and resides here. He is "invested with the rights guaranteed by the Constitution to all people within our borders."

The power of Congress to set standards for naturalization is very large, but like every other power of government it is circumscribed; it is not absolute. In *Girouard v. United States,* 328 U.S. 61 (1946), the Court refused to construe as mandatory a requirement made by Congress that a petitioner for naturalization swear

to support the Constitution by taking up arms in defense of this country. The Court did so because otherwise the statute would have been held as unconstitutional. *Girouard*, 328 U.S. at 65.

In the present case the Immigration Service and this court have construed the statute in such a way that it is unconstitutional. As construed, the statute permits the Immigration Service to undertake an inquiry far broader than any governmental necessity warrants. The Immigration Service draws to our attention Executive Order 11785 (June 4, 1974) forbidding it to maintain a list of subversive organizations. The Immigration Service may not maintain such a list but under its interpretation of its authority it may snoop into any and all organizations a resident alien has joined.

A narrowly tailored question could be asked of any petitioner without infringing on First Amendment rights. A petitioner could be asked if he had belonged to any organizations dedicated to the overthrow of the government or advocating or using terrorism or if he belonged to any foreign military, paramilitary or intelligence organization. Such a question would have an obvious relevance to the government's legitimate concerns. A question without bounds as to association has no relation to governmental concerns.

The Immigration Service says that the government is concerned with the petitioner's "character." Beyond excluding persons committed to subversion or terror or under the orders of a foreign government, there is no conceivable way that the government can measure a person's character. Persons of all kinds of character make up the United States. The Immigration Service cannot design some fine test by which only persons of outstanding character will be admitted as citizens. In reality we must take our applicants for citizens, as we take our citizens themselves, as a mix of people. That is the way immigrants have come to the United States and peopled it and that is the way it will always be.

The statute is without rational purpose and, infringing severely on the right of free association, it is unconstitutional. I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA No. 89-16457
DC No. PET-21298-WAI

JOHN ERIC PRICE,
Petitioner-Appellant,
vs.
IMMIGRATION and NATURALIZATION SERVICE,
Respondent-Appellee.

[Filed June 7, 1993]

ORDER

Before: BEEZER, NOONAN, Circuit Judges, and SINGLETON*, District Judge

This court in its April 20, 1992 disposition ordered the clerk to forthwith issue the mandate. Pursuant to that Opinion, the mandate was issued. The second Petition for Rehearing with suggestion for rehearing *en banc,* received May 5, 1992, is DENIED.

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* The Honorable James K. Singleton, United States District Judge, for the district of Alaska, sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN THE MATTER OF JOHN ERIC PRICE,

Petitioner.

Petition No. 21298-WAI

[Filed August 18, 1989]

JUDGMENT

In accordance with the accompanying Memorandum,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the above-entitled action is DISMISSED.

Dated: 8-18-89

/s/ WILLIAM A. INGRAM
William A. Ingram
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN THE MATTER OF JOHN ERIC PRICE,

Petitioner.

Petition No. 21298-WAI

[Filed August 18, 1989]

MEMORANDUM

Petitioner John Eric Price ("Price") moved for a final hearing on his naturalization petition. The Immigration and Naturalization Service ("INS") recommends this court deny Price's petition for naturalization because of his refusal to answer Question 18 on his application concerning his present and past membership in or association with organizations and other groups. Price contends that Question 18 violates his First Amendment freedom of association and that he has otherwise satisfied all qualifications or preconditions for naturalization. This constitutional challenge to Question 18 presents issues of first impression.

This matter comes before the court after oral argument and supplemental briefing on specified issues upon the request of the court and also by the request of the parties. *See* Order (filed Oct. 25, 1988); Order (filed Jan. 11, 1989); Order (filed Feb. 2, 1989). Upon consideration of all the papers and argument of counsel, the court holds that the denial of the petitioner's naturalization was made for a "facially legitimate and bona fide reason." The court therefore concludes that the petitioner is not entitled to naturalization until Question 18 is answered.

I. *Background*

Petitioner Price, age 52, is a native of England and a citizen of the United Kingdom. Price is an engineer with a microelectronics firm. Preliminary Examination Transcript, at 6-7 (July 27, 1988). On April 25, 1960, he became a lawful permanent resident of the United States. Price submitted an Application to File Petition for

Naturalization (Form N-400) on April 21, 1984. All questions were answered with the sole exception of Question 18, which provides:

> List your present and past membership in or affiliation with every organization, association, fund, foundation, party, club, society or similar group in the United States or in any other country or place, and your foreign military service. (If none, write "None.")

In lieu of an answer to Question 18, Price furnished a legal brief prepared by his counsel contending that the question impinged upon Price's First Amendment right of association.

Also in his application, Price responded negatively to Question 19, inquiring whether he had: (1) been a member of or associated with the Communist Party, (2) knowingly aided or supported the Communist Party, or (3) ever advocated, taught, believed in, or knowingly supported Communism. *See* INS Exhibit 1 (Form N-400, Question 19); *see also* INS Exhibit lB (Form N-405, Averment 11). A similar negative response was given at his second preliminary hearing. Preliminary Examination Transcript, at 14 (July 27, 1988).

On May 13, 1985, Price underwent a preliminary investigation under oath before a designated naturalization examiner.[1] On the same date, Price filed a Petition for Naturalization (Form N-405) also under oath in which he swore, *inter alia*, to averment 11:

> I am not and have not been, within the meaning of the Immigration and Nationality Act, for a period of at least ten years immediately preceding the date of this petition, a member of or affiliated with any organization proscribed by such Act, or any section, subsidiary, branch affiliate or subdivision thereof, nor have I during such period believed in, advocated, engaged in or performed any of the acts or activities prohibited by such Act.

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[1] This hearing was not recorded. *See* U.S. District Court Hearing Transcript, at 6-7 (Oct. 17, 1988).

On July 6, 1988, Price filed a motion to calendar his petition for final hearing before this court, pursuant to section 336 of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1447. This motion was granted on July 14, 1988 and the final hearing was calendared for September 19th. Because the court did not have the benefit of a full briefing, the parties agreed to continue the hearing to October 17, 1988 in order that both sides could file appropriate papers.

On July 27, 1988, the INS administered a second preliminary examination to Price. At this hearing which was attended by Price's counsel, Price partially answered Question 18 but then refused to answer any other inquiries related to the question on First Amendment grounds. In pertinent part, the following transpired during the hearing:

(Examiner:)

Q. I'll first ask you the way the question is stated on the application. "List your present and past membership . . . ", etc. Let me put it to you this way. Are you now or have you ever been a member or affiliated with any organization, association, fund, foundation, party, club, society or similar group in the United States or in any other country or place, and any foreign military service?

(Price:)

A. I will answer the second portion first. I have not had any foreign military service. Now, did you ask me if I have ever been a member of any organization?

Q. That is correct.

A. The answer is yes. You meant any organization.

Q. Any organization.

A. Yes.

. . . .

Counsel:

> I like to state this for the record, that any response to — as phrased in Question 18 is not intended to waive any constitutional rights or —
>
> . . . .

Preliminary Examination Transcript, at 9-10 (July 27, 1988).

On September 15, 1988, the Designated District Examiner submitted findings of fact and conclusions of law, pursuant to section 335 of the INA, 8 U.S.C. § 1446, to this court (as a designated naturalization court under section 310(a) of the INA, 8 U.S.C. § 1421(a)). The Examiner recommended the denial of the petition for naturalization on the ground that Price had not met his burden of proving his eligibility for naturalization through his failure to answer Question 18.

Question 18, or a comparable question, has been asked on naturalization petitions since 1949. *See* Declaration of R. Michael Miller, Deputy Assistant Commissioner Adjudications, at 1 (dated Nov. 9, 1988). From 1949 until 1987, more than 7.2 million aliens were naturalized. *Id.*[2] The information elicited from or concealed by applicants under Question 18 (or one comparable to it) has been the subject of naturalization, denaturalization, and deportation proceedings,[3] but no other court has directly reached the constitutional issues presented here.

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[2] In recently revised forms, Question 18 has been renumbered Question 29. Former Question 18 and current Question 29 are identical in every term. *See* INS Supplemental Brief, at 8 n.3 & Tab C (INS Form N-400) (filed Nov. 10, 1988).

[3] *See, e.g., Schellong v. INS*, 805 F.2d 655, 657 (7th Cir. 1986) (deportation order affirmed where individual concealed and willfully misrepresented prior association with Nazi groups on visa application and naturalization petition in response to question asking applicant to "List each organization, association, fund, foundation, club or society in the United States or in any other place that you have been a member of at any time, and the dates of membership in each"), *cert. denied*, 481 U.S. 1004, 107 S.Ct. 1624, 95 L.Ed.2d 199 (1987); *United States v. Schellong*, 547 F. Supp. 569, 572 (N.D. Ill. 1982) (same individual and

II. *Analytical Framework:*

Congress has plenary authority in the field of immigration and naturalization.[4] The burden is on the petitioner seeking naturalization to establish his entitlement to citizenship.[5] The court must ascertain whether the petitioner has satisfied the established qualifications to be entitled for citizenship. *See* Section 310(d) of the INA, 8 U.S.C. § 1421(d) ("A person may be naturalized in the manner and under the conditions prescribed in this subchapter, and not otherwise.").

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similar facts in denaturalization proceeding), *aff'd*, 717 F.2d 329, 332 (7th Cir. 1983), *cert. denied*, 465 U.S. 1007, 104 S.Ct. 1002, 79 L.Ed.2d 234 (1984); *In re Duncan*, 713 F.2d 538, 543 (9th Cir. 1983) (constitutional issues not reached on issue preclusion grounds in a naturalization proceeding where one question requested the applicant to "list your present and past membership in or affiliation with every organization, association, fund, foundation, party, club, society or similar group in the United States or in any other country or place, and your foreign military service"). *See also United States v. Walus*, 453 F. Supp. 699, 704 (N.D. Ill. 1978) (denaturalization proceeding based on alleged Membership in Schutzstaffeln (SS), German Gestapo and other organizations), *rev'd*, 616 F.2d 283 (7th Cir. 1980); *United States v. Kairys*, 600 F. Supp. 1254, 1267 (N.D. Ill. 1984) (denaturalization of a former Nazi camp guard), *aff'd*, 782 F.2d 1374 (7th Cir.), *cert. denied*, 476 U.S. 1153, 106 S.Ct. 2258, 90 L.Ed.2d (1986); *United States v. Osidach*, 513 F. Supp. 51, 104, 105 (E.D. Pa. 1981) (denaturalization proceeding concerning individual's organizational, political, criminal and employment activities during World War II).

[4] *See, e.g., Fiallo v. Bell*, 430 U.S. 787, 792, 97 S.Ct. 1473, 52 L.Ed.2d 50, 56 (1977); *Kleindienst v. Mandel*, 408 U.S. 753, 92 S.Ct. 2576, 33 L.Ed.2d 683, 693-94 (1972).

The Constitution provides that "The Congress shall have Power . . . [t]o establish an uniform Rule of Naturalization." U.S. Const., art. I, § 8, cl. 4.

[5] *Berenyi v. District Director, INS*, 385 U.S. 630, 637, 87 S.Ct. 666, 17 L.Ed.2d 656 (1967) ("[I]t has been universally accepted that the burden is on the alien applicant to show his eligibility for citizenship in every respect.") (quoted in *INS v. Pangilinan*, 486 U.S.____, 108 S.Ct. 2210, 100 L.Ed.2d 882, 895 (1988)).

Specifically, the first issue presented is whether a requirement that Question 18 be answered may serve as a proper prerequisite to citizenship pursuant to congressional authorization.[6] Because it is axiomatic that federal statutes should first be construed to avoid serious questions as to their constitutionality, the court's inquiry begins with an interpretation of the statute and the delegation of authority to the Attorney General.[7]

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[6] *See INS v. Pangilinan*, 486 U.S. ___, 108 S.Ct. 2210, 100 L.Ed.2d 882, 895 (1988) (noting the federal courts must enforce the terms and conditions as mandated by Congress in the naturalization statute); *see also Fedorenko v. United States*, 449 U.S. 490, 506-07, 101 S.Ct. 737, 66 L.Ed.2d 686, 701 (1981) (noting congressionally imposed rules for citizenship "safeguard the integrity of this 'priceless treasure' ") (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 791, 70 S.Ct. 936, 94 L.Ed. 1255 (1950) (Black, J., dissenting)).

[7] *See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 108 S.Ct. 1392, 1397, 99 L.Ed.2d 645 (1988) (noting that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.") (citations omitted); *Crowell v. Benson*, 285 U.S. 22, 62, 52 S.Ct. 285, 296-97, 76 L.Ed. 598 (1932) ("When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.") (quoted in *California v. Arizona*, 440 U.S. 59, 66, 99 S.Ct. 919, 59 L.Ed.2d 144 (1978)); *see also Duncan*, 713 F.2d at 541 (avoiding First and Fifth Amendment Constitution issues on grounds of issue preclusion where petitioner for naturalization refused to answer application questions concerning prior criminal activity, membership in organizations, belief in communism, and moral character; noting that "we are directed to consider non-constitutional bases for disposition before proceeding to pass upon constitutional questions") (citations omitted).

A. *Whether Question 18 Is Permitted Under the Naturalization Statute?*

1. *Overview: Congressional Delegation*

Section 332(c) of the INA, 8 U.S.C. § 1443(c), provides in part that "[t]he Attorney General shall prescribe and furnish such forms as may be required to *give effect* to the provisions of" the naturalization laws "and is authorized to prescribe the scope and nature of the examination of petitioners for naturalization as to their admissibility to citizenship for the purpose of making appropriate recommendations to the naturalization courts." (emphasis added).[8] Congress has further delegated that the petition for naturalization "shall be on a form prescribed by the Attorney General and shall include averments of all facts which in the opinion of the Attorney General may be material to the applicant's naturalization, and required to be proved upon the hearing of such petition." Section 334(a) of the INA, 8 U.S.C. § 1445(a). Moreover, Congress has authorized naturalization examiners "to take testimony concerning any matter touching or, in any way, affecting the admissibility of any petitioner for naturalization." Section 335(b) of the INA, 8 U.S.C. § 1446(b). *See also* 8 C.F.R. § 335.11(b).

Petitioners for naturalization must meet specified qualifications, such as having "good moral character" and being "attached

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[8] *See also* Section 103(a) of the INA, 8 U.S.C. § 1103(a); 8 C.F.R. § 100.6 (authorizing, *inter alia*, the Attorney General to establish regulations and instructions "necessary for carrying out his authority under the" naturalization laws); 8 C.F.R. § 103.2(a) (mandating that every form application "shall be executed and filed in accordance with the instructions contained on the form, such instructions being hereby incorporated into the particular section of the regulations requiring its submission"); 8 C.F.R § 332a.2 (official forms prescribed for use of clerks of naturalization courts).

A petition for naturalization commences upon the filing of preliminary application Form N-400. 8 C.F.R. § 334.11. The INS then notifies the petitioner "when and where to apear for preliminary investigation and filing his/her petition for naturalization." *Id.* The petition for naturalization is filed on Form N-405. *Id.* § 334.13.

to the principles of the Constitution of the United States," section 316(a)(3) of the INA, 8 U.S.C. § 1427(a)(3). Among other requirements, Congress has further proscribed that naturalization is unavailable to those persons (within ten years preceding their application) opposed to government or law, or who favor totalitarian forms of government. Section 313(a), (c) of the INA, 8 U.S.C. § 1424(a), (c).

Section 313(a) prohibits the naturalization of persons within six enumerated categories, including a person who (1) advocates or teaches, or is a member of any organization that advocates or teaches, opposition to all organized government; (2) is a member of or affiliated with the Communist Party of the United States, or any other totalitarian party of the United States, or other similar enumerated domestic or foreign organizations; (3) advocates or teaches the economic, international, governmental doctrines of world communism, or the establishment of a totalitarian dictatorship in the United States, or is a member of or affiliated with an organization that advocates such doctrine; (4) advocates or teaches, or is a member of any organization that advocates or teaches, (a) the forcible or unconstitutional overthrow of the United States government, (b) "the duty, necessity, or propriety" of the unlawful assaulting or killing of any officer of the United States or other organized government, or (c) the destruction of property, or (d) sabotage; (5) writes, publishes or distributes any written or printed matter advocating the actions or doctrines of subdivisions (3) & (4); and (6) is a member of or affiliated with any organization which writes, publishes, or distributes any written or printed matter described in subdivisions (3) & (4). *See also* Section 101(a)(2) & (37) of the INA, 8 U.S.C. § 1101(a)(2) (defining "advocates"), (a)(37) (defining "totalitarian party"), (e)(1) (defining "advocating"), (e)(2) (defining "affiliation"), & (e)(3) (noting definition of advocating totalitarian communist dictatorship).[9]

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[9] This theme of exclusion of persons supporting or advancing totalitarianism or communism is echoed in other parts of the INA. *See* Sections 212(a)(27)-(29) & 241(a)(6)-(7) of the INA, 8 U.S.C. §§ 1182(a)(27)-(29) (ineligibility to receive visas and exclusion from admission) & 1251(a)(6)-(7) (deportation). *See generally Kleindienst,*

2. *Discussion*

The statutory inquiry concerns whether Question 18 is permitted by any particular provision(s) of the INA, including section 313. Price originally did not challenge the constitutionality of section 313 or any other provision of the INA.[10] Initially, the court looks to the plain language of the statute. Both sides concede that the substantive attributes of Question 18 derive from section 313. See *INS* Supplemental Brief, at 8 (filed Nov. 10, 1988); Petitioner's Opposition Brief, at 14 (filed Oct. 7, 1988); Petitioner's Supplemental Brief, at 3 (filed Nov. 9, 1988).

In enumerating which persons are not eligible for naturalization, section 313 of the INA speaks in broad terms, seemingly delegating a broad mandate to the Attorney General for inquiries such as Question 18. In section 313[11] (1) there is repeated use of

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[10] Originally, the petitioner only expressly challenged Question 18, contending that there was no congressional authorization for the Attorney General to allow his designees to ask this question. *See, e.g.*, Petitioner's Supplemental Brief, at 7 (filed Nov. 9, 1988) (contending in "the present case" there is no "direct conflict between a statute and the First Amendment"); U.S. District Court Hearing Transcript, at 6-7 (Oct. 17, 1988) (asking the court to find as a matter of statutory construction that Question 18 is not statutorily permitted).

However, for the first time in supplemental briefing, the petitioner challenged section 313 of the INA as unconstitutional. *See* Petitioner's Supplemental Memo, at 2, 14 (filed Apr. 13, 1989). As noted in the text of this Memorandum, the court does not conclude that any of the naturalization provisions in issue are unconstitutional.

[11] The statute expressly excludes from naturalization any person "who is a member of or affiliated with *any organization* that advocates or teaches[ ] opposition to all organized government," 8 U.S.C. § 1424(a)(1) (emphasis added), or "who is a member of or affiliated with . . . *any* other totalitarian party" of the "United States," or "State of the United States," or "*any* foreign state or of *any* political or geographical subdivision of *any* foreign state," "any section, subsidiary, branch, affiliate or subdivisions of *any* such *association* or party," "the direct predecessors or successors of *any* such *association* or party," "*any* Communist-action organization" during specified times, "*any* Communist-front organization" during specified times, *id.* §1424(a)(2) (em-

the term "any" with regard to the specified organizations; (2) the references to the enumerated groups are made in broad domestic or foreign geographic or political terms; (3) while the organizations are generally concerned with communism, totalitarianism, or anarchistic or unlawful doctrines, the statute discusses these doctrines in expansive terms and also includes concerns about persons who would advocate or teach the destruction of property or sabotage, or the unlawful assaulting or killing of a government officer; (4) the acts or activities of concern under the statute include membership, affiliation in specified groups or the publication or distribution, or the advocacy or teaching of certain prescribed acts; and (5) several of the terms in Question 18 appear to be directly borrowed from or based upon the statute, including the use of the terms "member," "affiliated with," and "organization."[12]

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phasis added), or "who is a member of or affiliated with *any* organization that advocates the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship," *id.* § 1424(a)(3) (emphasis added), "who is a member of or affiliated with *any* organization that advocates" (a) the forcible or unconstitutional overthrow of the United States government, (b) "the duty, necessity, or propriety" of the unlawful assaulting or killing of any officer of the United States or other organized government, or (c) the destruction of property, or (d) sabotage; *id.* § 1424(a)(4) (emphasis added), or writes, publishes, or otherwise distributes "*any* written or printed matter" advocating or teaching opposition to government or other doctrines within subdivision (3) & (4) of the statute, *id.* § 1424(a)(5) (emphasis added), or "who is a member of or affiliated with *any* organization" that writes, publishes, or otherwise distributes "written or printed matter" concerning doctrines within subdivision (3) & (4). *id.* § 1424(a)(6) (emphasis added).

[12] The statute further defines "affiliation" as "[t]he giving, loaning, or promising of support or of money or any other thing of value for any purpose to any organization." Section 101(e)(2) of the INA, 8 U.S.C. § 1101(e)(2). However, the statute provides that this definition "shall not be construed as an exclusive definition of affiliation."

Much of Question 18 directly tracks or is parallel to the structure of and concerns enumerated in section 313. Thus, Question 18 is aimed toward "membership in" or "affiliation in" certain groups just as section 313 notes concern over individuals who are "member[s] of or affiliated with" enumerated entities. Section 313 seeks to exclude individuals connected with specified "organization[s]," "part[ies]," "political or geographical subdivision[s]," "section[s], subsidiar[ies], branch[es], affiliate[s] or subdivision[s] of [identified association[s] or part[ies];" Question 18 similarly requests information regarding affiliations with "organization[s], association[s], fund[s], foundation[s], part[ies], club[s], societ[ies] or similar group[s]." Geographically, both Question 18 and section 313 are directed to domestic and foreign groups. Section 313 is concerned about an applicant's prior foreign military service, which is also noted in section 313. However, Question 18 is broader than the statutory provison to the extent it seeks "present and past" membership or affiliation, while section 313 is concerned solely with the ten years prior to application.

The plain language and breadth of the terms used and the parallelism in structure strongly suggest that Question 18 is authorized by section 313. Significantly, in the action at bar, the court need not decide whether Question 18 falls within section 313 and that section alone. Congress has enacted other provisions of the INA which the court must consider in conjunction with section 313 as possible bases for Question 18.

The statute delegates to the Attorney General broad authority for both *written* and *testimonial* examination of naturalization applicants. Since 1952, section 332(c) has provided the Attorney General with the authority to promulgate forms or rules to enforce and to "*give effect*" to the statute. 8 U.S.C. § 1443(c). The operative verb "effect" is defined: "To do; to produce; to make; to bring to pass; to execute; enforce; accomplish." Black's Law Dictionary 461 (5th ed. 1979). Thus, under the plain meaning of this provision, the Attorney General has authority to enforce or accomplish the delegated naturalization duties by adopting naturalization forms and promulgating rules.

The Attorney General is also statutorily assigned the task of eliciting *written* responses from applicants through section 103(a), which permits the Attorney General to "establish . . . regulations; prescribe . . . reports, entries, and other papers; issue . . . instructions; and perform . . . other acts as he deems necessary for carrying out his authority" under the naturalization laws. 8 U.S.C. § 1103(a) (amended 1988). Finally, section 334(a) provides that the naturalization petition shall be "on a *form* prescribed by the Attorney General [which] shall include averments of all facts which in the *opinion of the Attorney General* may be material to the applicant's naturalization, and required to be proved upon the hearing of such petition." 8 U.S.C. § 1445(a) (amended 1981) (emphasis added).

In addition to these *written* requirements, section 335(b) permits broad authority for *testimonial* examination to INS employees designated by the Attorney General (naturalization examiners), including "testimony concerning *any matter touching or, in any way, affecting the admissibility* of *any petitioner* for naturalization." 8 U.S.C. § 1446(b) (amended 1981) (emphasis added). Since 1952, section 332(c) has authorized the Attorney General "to prescribe the *scope and nature* of the examination of petitioners for naturalization as to their admissibility to citizenship for the purpose of making appropriate recommendations to the naturalization courts." 8 U.S.C. § 1443(c) (emphasis added).

In considering these provisions collectively (and the broad, express language employed therein), this court finds that Congress has explicitly delegated to the Attorney General and his designees ample authority to make written and testimonial inquiries of the form embodied in Question 18. The court concludes that under the plain language of the statute, Question 18 "gives effect" to the provisions of the naturalization statute, "touches upon and affects" the admissibility of the petitioner for naturalization, and constitutes a valid exercise of the Attorney General's delegated authority to make written and testimonial examination of naturalization applicants.[13]

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[13] The court finds the statutory language unambiguous. Moreover, based upon consideration of the papers submitted and review of the

As a consequence of this finding, this court turns to the First Amendment issues presented.

B. *The First Amendment*

A lawful resident alien is entitled to the rights secured under the First Amendment. *See Bridges v. California,* 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192 (1942); *see generally United States v. Verdugo-Urquidez,* 856 F.2d 1214, 1219 (9th Cir. 1988) (citing several cases for the proposition "that aliens within the United States enjoy the benefits of the first, fifth, sixth and fourteenth amendments), *cert. granted,* 104 L.Ed.2d 178 (1989). The INS concedes that a lawful permanent resident alien, like the petitioner, "has rights and privileges under the United States Consti-

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legislative history, the court finds that the legislative history does not lead to a contrary result. Thus, if "the plain language of th[e] statute appears to settle the question," the court may "look to the legislative history to determine only whether there is 'clearly expressed legislative intention' contrary to that language, which would require [it] to question the strong presumption that Congress expresses its intent through the language it chooses." *INS v. Cardoza-Fonseca,* 480 U.S. 421, 107 S.Ct. 1207, 94 L.Ed.2d 434, 448 n.12 (1987) (citations omitted). *See also Columbia Pictures Industries, Inc. v. Professional Real Estate Investors, Inc.,* 866 F.2d 278, 280 n.4 (9th Cir. 1989) ("[T]he plain language is regarded as conclusive, unless (1) the statutory language is unclear, (2) the plain meaning of the words is at variance with the policy of the statute as a whole, or (3) a clearly expressed legislative intent exists contrary to the language of the statute.") (citations omitted); *Fernandez v. Brock,* 840 F.2d 622, 632 (9th Cir. 1988) ("Unless exceptional circumstances dictate otherwise, if we find the statutory language unambiguous, then we will not resort to the legislative history.") (citation omitted).

In response to a request for further briefing by the court, the petitioner's exclusive argument of support for his position in the legislative history is one statement made by Senator McCarren, a primary sponsor of the bill, during consideration of the conference report. The Senator stated, "I feel this is a good bill and that it does not, in any way, violate any rights guaranteed under the Constitution to persons in this country." 98 Cong. Rec. 7017 (1952). This isolated statement is made in the Senator's general remarks concerning the legislation and does not establish an ambiguous or contrary intent in the statutory language.

tution, including the First Amendment guarantees of free speech and association." District Examiner Conclusions of law, ¶ (g), INS Opposition Brief, at 25 (filed Sept. 15, 1988). *See also* INS Opposition Brief, at 16.[14]

1. *Standard to be Applied*

The parties are in dispute over what standard should be applied. The INS asserts that there is limited judicial review, while Price contends that a balancing test under traditional First Amendment analysis should be employed.[15]

a. *Applicability of Kleindienst*

The INS principally cites *Kleindienst v. Mandel,* 408 U.S. 753, 92 S.Ct. 2576, 33 L.Ed.2d 683 (1972) for the proposition that even where First Amendment rights are implicated judicial scrutiny is limited on immigration and naturalization matters. *Kleindienst* involved a non-resident alien, who had twice been admitted into the United States but who was denied a visa and excluded

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[14] There are two recognized aspects to the freedom of association under the First Amendment: (1) there is the freedom "against unjustified government interference with an individual's choice to enter into and maintain certain intimate or private relationships;" *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 107 S.Ct. 1940, 95 L.Ed.2d 474, 483 (1987); and (2) there is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. United States Jaycees*, 468 U.S. 609, 622, 104 S.Ct. 3244, 82 L.Ed.2d 462, 474 (1984). Price does not distinguish which of these associational freedoms (if not both) are allegedly impinged by Question 18.

[15] The INS suggests that Price waived his First Amendment privilege against cross-examination by his partial response to Question 18. INS Brief, at 19 n.7 (Sept. 15, 1988). The court does not decide whether such a waiver is available in the First Amendment context in naturalization proceedings. The INS cases cited are criminal cases involving the Fifth Amendment which note the principle that "by testifying the defendant opens himself to cross-examination." *United States v. Panza,* 612 F.2d 432, 438 (9th Cir. 1979) (citation omitted), *cert. denied*, 447 U.S. 925, 100 S.Ct. 3020, 65 L.Ed.2d 1118 (1980). Price did not respond to this waiver issue in his reply brief.

from a third admission to attend academic meetings. Mandel, a citizen of Belgium, was denied a visa — under section 212(a)(28)(D) & (G)(v) of the INA, 8 U.S.C. § 1182(a)(28)(D) & (G)(v), and in the absence of a waiver by the Attorney General — as an "advocate" and author of "the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship."

American scholars and students argued that their First Amendment rights were violated when Mandel was refused admission. After emphasizing the plenary authority of the Congress on immigration matters, *Kleindienst*, 408 U.S. at 765-67, 33 L.Ed.2d at 693-94, the Supreme Court held that:

> when the Executive exercises this [delegated] power [to exclude] negatively on the basis of a *facially legitimate and bona fide reason*, the courts will neither look behind the exercise of that discretion, nor test it by *balancing* its justification against the First Amendment interests of those who seek personal communication with the applicant. What First Amendment or other grounds may be available for attacking exercise of discretion for which no justification whatsoever is advanced is a question we neither address nor decide in this case.

Id., 408 U.S. at 770, 33 L.Ed.2d at 696 (emphasis added).

Subsequent to *Kleindienst,* in *Fiallo v. Bell,* 430 U.S. 787, 795 n.6, 97 S.Ct. 1473, 52 L.Ed.2d 50, 58 n.6 (1977), the Supreme Court rejected the application of a "more exacting" First Amendment standard than that employed in *Kleindienst* and noted the plenary authority of the legislative branch and "the inevitable process of 'line drawing' . . . [by the Congress] to satisfy national objectives." In *Fiallo,* the Supreme Court held that sections 101(b)(1)(D) and 101(b)(2) of the INA were "not unconstitutional by virtue of the exclusion of the relationship between an illegitimate child and his natural father from the [statutory] preferences accorded by the [INA] to the 'child' or 'parent' of a United States citizen or lawful permanent resident." *Id.,* 430 U.S. at 800, 52 L.Ed.2d at 61.

The rationale underpinning these cases is similar. In both decisions, the Supreme Court noted that attributes of sovereignty were implicated by the immigration provisions in issue, which were enacted pursuant to the plenary authority of Congress over immigrations matters. *Fiallo,* 430 U.S. at 792, 52 L.Ed.2d at 56; *Kleindienst,* 408 U.S. at 766, 33 L.Ed.2d at 694. The Supreme Court took note of the intrinsic political character of the exercise of the immigration power. *Fiallo,* 430 U.S. at 792, 52 L.Ed.2d at 56 (noting "the power over aliens is of a political character and therefore subject only to narrow judicial review") (quoting *Hampton v. Mow Sun Wong,* 426 U.S. 88, 101 n.21, 96 S.Ct. 1895, 48 L.Ed.2d 495 (1976) (citing *Fong Yue Ting v. United States,* 149 U.S. 698, 713, 13 S.Ct. 1016, 37 L.Ed.2d 905 (1893))); *Kleindienst,* 408 U.S. at 766-67, 33 L.Ed.2d at 694. The extensive congressional regulation over immigration was another factor cited. *Kleindienst,* 408 U.S. at 766, 33 L.Ed.2d at 694 ("As to the extent of the power of Congress under review, there is not merely 'a page of history' . . . but a whole volume.") (quoting *Galvin v. Press,* 347 U.S. 522, 531, 74 S.Ct. 737, 98 L.Ed. 911, 922 (1954)). In both decisions, the Supreme Court felt it "important to underscore" these underlying principles. *Fiallo,* 430 U.S. at 792, 52 L.Ed.2d at 56. Based upon this rationale, the Supreme Court concluded that limited judicial review was appropriate for the denial of relief under the immigration statute.

b. *Balancing Test*

Instead of the limited standard of review under *Kleindienst,* the petitioner asks this court to apply a balancing test employed under traditional First Amendment analysis. The petitioner argues that Question 18 violates his First Amendment rights because it does not serve a "legitimate and substantial" government purpose. Significantly, no *naturalization* case utilizing such a balancing test is cited by the petitioner. Only two balancing test cases are advanced by Price and one only involves the *dicta* in a concurring opinion. *Bridges v. Wixon,* 326 U.S. 135, 161, 65 S.Ct. 1443, 89 L.Ed. 2103 (1945) (Murphy, J., concurring); *Brunnenkant v. Laird,* 360 F. Supp. 1330 (D. D.C. 1973).

The court finds the petitioner's cases are unpersuasive in urging the adoption of a First Amendment balancing test in this naturalization proceeding. First, both decisions pre-date *Fiallo*; the Supreme Court *Bridges* opinion preceded *Kleindienst* by twenty-five years. Consequently, Price's authorities fail to take into account the important, underlying rationale in either *Kleindienst* or *Fiallo*. Second, both are clearly distinguishable on other grounds.[16]

c. *Conclusion*

1. *Kleindienst Controls*

There is no direct case on point with regard to the proper First Amendment standard to be applied in this naturalization proceeding. The INS has not cited and the court has not found a naturalization case applying the standard of review of *Kleindienst* and *Fiallo*. Price has not pointed to any naturalization cases which apply the First Amendment balancing test which he urges. The court is also not aware of any decisions subsequent to

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[16] In *Bridges*, the Supreme Court did not need to reach the constitutional question presented (including the First Amendment challenge) because the Court found (in the habeas corpus proceeding) that (1) Bridges had been deported on a misconstruction of the 1940 statutory term "affiliation" and (2) he had received an unfair hearing by the admission of *ex parte* hearsay evidence. *Bridges*, 326 U.S. at 156-57. Moreover, the statutory construction grounds involved a deportation provision in the 1940 immigration statute, not the 1952 statute currently before the court. It is only in the concurring opinion of Justice Murphy that the argument is advanced that Congress in exercising its plenary immigration authority may *not* infringe an alien's constitutional rights and that an alien should not be deported for exercising his First Amendment rights. *Id.* at 160-63 (Murphy, J., concurring).

Brunnenkant did not even apply the immigration statute, but instead concerned Department of Defense directives and proceedings whereby an alien petitioner's withdrawal of his security clearance as an engineer was set aside. The district court found that (1) the petitioner did not receive a fair hearing consistent with due process and (2) his "heterodox political, social and economic views, however distasteful as to content or unwise as to timing, are not only clearly consistent with the national security, but are well within the area of protection provided by the First Amendment." *Brunnenkant*, 360 F. Supp. at 1332.

Kleindienst and *Fiallo* which employed such a balancing test in naturalization actions.

It is noteworthy that in actions involving the plenary immigration power to exclude, the Supreme Court in *Kleindienst*, expressly rejected a balancing test, *Kleindienst*, 408 U.S. at 770, 33 L.Ed.2d at 696, and also found, in *Fiallo*, "no reason to review the broad congressional policy choice at issue . . . under a more exacting standard." *Fiallo*, 430 U.S. at 795, 52 L.Ed.2d at 58. Further, similar governing principles are applicable here as were involved in *Kleindienst* and *Fiallo*. For example, it is settled that naturalization is an attribute of sovereignty. *See, e.g.*, 4 C. Gordon & H. Rosenfield, *Immigration Law & Procedure* § 14.1, at 14-2 (1988 ed.) ("It is axiomatic that an inherent incident of sovereignty is the power to define the manner in which citizenship can be acquired."). There is no right to naturalization. As one commentator has made this point:

> It is undisputed that there is no natural or inherent right to become a citizen of the United States. Nor does the Constitution specifically confer upon aliens any such right, but merely authorizes Congress to establish a uniform rule for naturalization. Consequently, an alien who seeks American citizenship can be naturalized only if he meets the requirements fixed by Congress.

4 C. Gordon & H. Rosenfield, *Immigration Law & Procedure* § 14.3, at 14-13 (1988 ed.). *See also supra* note 5; Section 310(d) of the INA, 8 U.S.C. § 1421(d) ("A person may be naturalized . . . in the manner and under the conditions prescribed in this subchapter, and not otherwise."); *Tutun v. United States*, 270 U.S. 568, 578, 46 S.Ct. 425, 70 L.Ed. 738 (1926). The plenary authority of Congress over naturalization policy choices is firmly established. *See, e.g., Fedorenko v. United States,* 449 U.S. 490, 506, 101 S.Ct. 737, 66 L.Ed.2d 686, 701 (1981) ("This judicial insistence on strict compliance with the statutory conditions precedent to naturalization is simply an acknowledgment of the fact that Congress alone has the constitutional authority to prescribe rules for naturalization, and the courts' task is to assure compliance with the particular prerequisites to the acquisition of United States citizenship . . . ."); *see also supra* note 4. Congress

also has an active record of regulation of all matters in this area. Prior to the ratification of the Constitution, the States exercised authority over naturalization. However, since the first Congress in 1790, the Congress has played an active role in naturalization matters. 4 C. Gordon & H. Rosenfield, *Immigration Law & Procedure* § 14.1, at 14-3 to 14-4. There is also a political component to naturalization policy decisions which is best left to articulation by the political departments of our government. Finally, as the Supreme Court has observed, "in the exercise of its broad power over immigration and naturalization, 'Congress regularly makes rules that would be unacceptable if applied to citizens.' " *Fiallo*, 430 U.S. at 792, 52 L.Ed.2d at 56 (quoting *Mathews v. Diaz*, 426 U.S. 67, 80, 96 S.Ct. 1883, 48 L.Ed.2d 478 (1976)).

In the absence of any direct authority, the court decides that the application of the limited standard of judicial review is mandated in this naturalization proceeding. This conclusion is reached as a result of the heavy precedent of judicial deference to Congress in First Amendment cases involving the plenary immigration and naturalization authority as well as the presence of the *Kleindienst* and *Fiallo* governing rationale in this case. Thus, the court's inquiry will be limited to whether the denial of the naturalization petition was predicated on "a facially legitimate and bona fide reason." *See Fiallo*, 430 U.S. at 795 & n.6, 52 L.Ed.2d at 58 & n.6; *Kleindienst*, 408 U.S. at 770, 33 L.Ed.2d at 696. *See also Lesbian/Gay Freedom Day Committee, Inc. v. INS*, 541 F. Supp. 569, 586 (N.D. Cal. 1982) (In an exclusion case under 8 U.S.C. § 1182(a)(4), applying *Kleindienst* and *Fiallo* and noting "when a court is presented with a constitutional challenge to an immigration decision by the executive or by Congress, the court determines whether that decision is based upon 'a facially legitimate and bona fide reason.' If the decision, is based upon a facially legitimate and bona fide reason, court scrutiny of the statute ends."), *aff'd sub nom. Hill v. INS*, 714 F.2d 1470 (9th Cir. 1983).[17]

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[17] Because the court concludes that there is "no reason to review the broad congressional policy choice at issue here under a more exacting

2. *Alternative Holding*

Before turning to analysis of the legitimacy of the denial of the naturalization application, the court alternatively holds that a balancing test urged by the petitioner does not lead to a contrary result.

One authority has noted that "while the power of Congress to prescribe qualifications for naturalization is quite extensive, it is not unlimited, and may be subjected to appropriate constitutional challenge." 4 C. Gordon & H. Rosenfield, *Immigration Law & Procedure* § 15.3, at 15-6 (1988 ed.). However, this observation begs several questions: What limitations should be imposed on this plenary naturalization authority? What standards of analysis should be employed in resolving such issues? Is the congressional power to make policy choices in the naturalization field distinct from the power to make similar policy decisions in the immigration area, which is afforded limited judicial review?

In addressing this issue, the court assumes *arguendo* that a balancing test should be applied, as urged by the petitioner. One naturalization case, decided before *Fiallo* and *Kleindienst*, reached a similar conclusion. *In re Petition For Naturalization of Matz*, 296 F. Supp. 927 (E.D. Cal. 1969) involved a First Amendment challenge by two petitioners who were Jehovah's Witnesses who refused, on religious grounds, to vote, serve on juries, and take an oath concerning the bearing of arms and noncombatant service. The district court "assume[d] without deciding that the first amendment imposes some limit which Congress may not exceed in prescribing naturalization requirements." *Id.* at 931. In making this assumption, the court applied a balancing test and concluded that the denial of naturalization was correct because the "paramount interest" of Congress in establishing the specified naturalization requirements outweighed the First Amendment interests of the petitioners. *Id.* at 932.

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standard than was applied in *Kleindienst v. Mandel*, a First Amendment case," *Fiallo*, 430 U.S. at 795, 52 L.Ed.2d at 58, the court declines to apply other First Amendment cases urged by the petitioner. The court further notes that none of these First Amendment cases involve naturalization.

Similarly, this court would conclude here that there is a compelling interest of the government to ask Question 18 and have it answered as a precondition to naturalization which outweighs any First Amendment right of association of the petitioner. Thus, the application of the balancing test supports a denial of the naturalization petition until Question 18 is answered. While the government may not make a discretionary inquiry "for which no justification whatsoever is advanced," *Kleindienst*, 408 U.S. at 770, 33 L.Ed.2d at 696, this court concludes that the government does have a compelling interest to ask such questions as Question 18. As a matter of sovereignty, the government has an interest in ascertaining the qualifications of the naturalization applicant consistent with congressionally determined standards, including section 313 and other provisions of the INA. The responses elicited under Question 18 (or comparable questions concerning the applicant's present and past memberships and affiliations) have been the subject of denaturalization or deportation proceedings. *See supra* note 3. Although in the petitioner's "opinion" he does not belong to any groups proscribed by the statute, this determination is assigned to the Attorney General and his designates.

Further, in ascertaining the qualifications of the applicant, there is a compelling government interest in discharging the task thoroughly and accurately. At the application stage for naturalization, the burden is on the petitioner to demonstrate that all citizenship requirements have been met. However, after naturalization, the burden shifts, as the INS has a "clear, unequivocal and convincing evidence" burden for denaturalization. *See, e.g., INS v. Pangilinan*, 486 U.S. ___, 108 S.Ct. 2210, 100 L.Ed.2d 882, 895 (1988), *Berenyi v. District Director, INS*, 385 U.S. 630, 637, 87 S.Ct. 666, 17 L.Ed.2d 656 (1967); *Schneiderman v. United States*, 320 U.S. 118, 125, 63 S.Ct. 1333, 87 L.Ed. 1796 (1943). In the words of the Supreme Court:

> [O]ur decisions have recognized that the right to acquire American citizenship is a precious one, and that once citizenship has been acquired, its loss can have severe and unsettling consequences. For these reasons, we have held that the Government "carries a heavy burden of proof in a

> proceeding to divest a naturalized citizen of his citizenship." *Costello v. United States*, 364 U.S. 265, 269, 81 S.Ct. 534, 5 L.Ed.2d 551 (1961).... Any less exacting standard would be inconsistent with the importance of the right that is at stake in a denaturalization proceeding. . . .
>
> At the same time, our cases have also recognized that there must be strict compliance with all the congressionally imposed prerequisites to the acquisition of citizenship. Failure to comply with any of these conditions renders the certificate of citizenship "illegally procured," and naturalization that is unlawfully procured can be set aside. 8 U.S.C. § 1451(a).

Fedorenko, 449 U.S. at 505-06, 101 S.Ct. 737, 66 L.Ed.2d at 700-01 (other citations omitted). Moreover, as already noted, the Supreme Court has stated that Congress may establish standards pursuant to its naturalization power which " 'would be unacceptable if applied to citizens.' " *Fiallo*, 430 U.S. at 792, 52 L.Ed.2d at 56 (quoting *Mathews v. Diaz*, 426 U.S. 67, 80, 96 S.Ct. 1883, 48 L.Ed.2d 478 (1976)).

For these reasons, the court concludes that even under a balancing test, the government has a compelling interest in mandating a response to Question 18 as a precondition to naturalization which outweighs any First Amendment right of association of the petitioner to refuse to answer the question.[18]

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[18] The petitioner also argues that the recent district court decision in *American-Arab Anti-Discrimination Committee v. Meese*, No. 87-2107-SVW (C.D. Cal. Dec. 22, 1988) should control the action at bar. In *Meese*, the district court found unconstitutional several deportation provisions which are similar to the primary, substantive naturalization provision before this court, section 313 of the INA, 8 U.S.C. § 1424. The court finds *Meese* inapposite on several grounds. First, *Meese* rejected the rationale/analytical framework of *Kleindienst* and *Fiallo*, which this court concludes should govern this naturalization case. Second, *Meese*, on its own terms is distinguishable because it was limited to the deportation setting. *See id.* slip op. at 33, 35. Finally, serious jurisdictional questions were present in *Meese* which cast doubt on the opinion and which are not present in this action.

2. *Whether the Denial Was For A "Facially Legitimate and Bona Fide Reason"?*

According to the INS, the petitioner's application for naturalization was denied "because petitioner's refusal to testify constituted a failure to fulfill a statutory condition precedent, *i.e.*, to give testimony touching or in any way affecting whether or not he belonged to proscribed organizations." Government's Amended Response to Order, at 23 (filed Nov. 10, 1988). With regard to whether the denial was facially legitimate and predicated on a bona fide reason, the petitioner only contended that there was no statutory basis for Question 18. *See* Petitioner's Supplemental Brief, at 9 (filed Nov. 9, 1988). As this court has already concluded, several provisions in the INA provide the Attorney General and his designates ample authority to ask questions such as Question 18. This court has already found that several provisions of the INA provide ample authority to the Attorney General and his designates to ask and require an answer to Question 18. Moreover, in the case at bar, the petitioner has partially answered the question in the affirmative, stating that he has been a member of "any organization." Preliminary Examination Transcript, at 10 (July 27, 1988). Question 18 expressly specifies that a naturalization applicant may indicate that he or she is or has not been a member of any organizations or similar groups. Accordingly, in light of this partial response and the failure of the petitioner to fully answer Question 18, this court holds that the denial of the naturalization application was founded on a "facially legitimate and bona fide reason."

C. *Conclusion*

Based on the foregoing, the court concludes: (1) the Attorney General and his designates have sufficient statutory authority to ask and require responses to Question 18; (2) a limited judicial standard of review should govern the First Amendment issues raised in this naturalization proceeding as specified in *Kleindienst* and *Fiallo*; (3) alternatively, under a balancing test, the government has a compelling interest in asking and requiring a response to Question 18 which outweighs any First Amendment rights of the petitioner; and (4) the denial of the naturalization application

for failure to answer Question 18 constituted a "facially legitimate and bona fide reason" for denial.

In reaching this result, this court does not concern itself with the propriety of the statutory provisions in issue. The Constitution expressly provides the naturalization power to Congress. As a result, the judicial branch may not involve itself in the "line-drawing" process intrinsic to naturalization policy decisions.[19] *See, e.g., Fiallo*, 430 U.S. at 795 n.6, 52 L.Ed.2d at 58 n.6 (1977). The policy choices embodied within the statute are clearly left to Congress for articulation.

DATED: 8-18-89

/s/ WILLIAM A. INGRAM
WILLIAM A. INGRAM
United States District Judge

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[19] Indicative of the fine process of "line-drawing" left to the Congress in this policy field, recently a law was enacted which provided that "no alien may be denied a visa or excluded from admission into the United States, subject to restriction or conditions on entry into the United States, or subject to deportation because of any past, current, or expected beliefs, statements, or associations which, if engaged in by a United States citizen in the United States, would be protected under the Constitution of the United States. *See* Foreign Relations Authorization Act, Fiscal Years 1988 & 1989, § 901, Pub. L. No. 100-204, 101 Stat. 1331, 1399-1400 (the so-called Moynihan-Frank Amendment). While this law will expire on its own terms, prior law permitted the exclusion or deporation of persons based on, *inter alia*, "their expression of beliefs, their advocacy of political positions, or their association in political organizations which would, be constitutionally protected if engaged in by U.S. citizens within the United States." House Conference Report No. 475, 100th Cong., 1st Sess. 162-63 (1987) (citing 8 U.S.C. § 1182(a)).

Some of the provisions under review by the court have also undergone recent revision: sections 334(a) and 335(b) of the INA were recently amended in 1981, sections 103(a) and 313 were amended in 1988, while section 332(c) has remained unchanged since 1952.

APPENDIX E

§ 1424. Prohibition upon the naturalization of persons opposed to government or law, or who favor totalitarian forms of government

(a) Notwithstanding the provisions of section 405(b) of this Act, no person shall hereafter be naturalized as a citizen of the United States –

(1) who advocated or teaches, or who is a member of or affiliated with any organization that ~~advocates or~~ teaches, opposition to all organized government; or

(2) who is a member of or affiliated with (A) the Communist Party of the United States; (B) any other totalitarian party of the United States; (C) the Communist Political Association; (D) the Communist or other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state; (E) any section, subsidiary, branch, affiliate, or subdivision of any such association or party; and (F) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt, unless such alien establishes that he did not have knowledge or reason to believe at the time he became a member of or affiliated with such an organization (and did not thereafter and prior to the date upon which such organization was so registered or so required to be registered have such knowledge or reason to believe) that such organization was a Communist-front organization; or

(3) who, although not within any of the other provisions of this section, advocates the economic, international, and governmental doctrines of world

communism or the establishment in the United States of a totalitarian dictatorship, or who is a member of or affiliated with any organization that advocates the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship, either through its own utterances or through any written or printed publications issued or published by or with the permission or consent of or under authority of such organization or paid for by the funds of such organization; or

(4) who advocates or teaches or who is a member of or affiliated with any organization that advocates or teaches (A) the overthrow by force or violence or other unconstitutional means of the Government of the United States or of all forms of law; or (B) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government because of his or their official character; or (C) the unlawful damage, injury, or destruction of property; or (D) sabotage; or

(5) who writes or publishes or causes to be written or published, or who knowingly circulates, distributes, prints, or displays, or knowingly causes to be circulated, distributed, printed, published, or displayed, or who knowingly has in his possession for the purpose of circulation, publication, distribution, or display, any written or printed matter, advocating or teaching opposition to all organized government, or advocating (A) the overthrow by force, violence, or other unconstitutional means of the Government of the United States or of all forms of law; or (B) the duty, necessity, or propriety of the

unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government, because of his or their official character; or (C) the unlawful damage, injury, or destruction of property; or (D) sabotage; or (E) the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship; or

(6) who is a member of or affiliated with any organization that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue, or display, any written or printed matter of the character described in subparagraph (5) of this subsection.

(b) The provisions of this section or of any other section of this title shall not be construed as declaring that any of the organizations referred to in this section or in any other section of this title do not advocate the overthrow of the Government of the United States by force, violence, or other unconstitutional means.

(c) The provisions of this section shall be applicable to any applicant for naturalization who at any time within a period of ten years immediately preceding the filing of the application for naturalization or after such filing and before taking the final oath of citizenship is, or has been found to be within any of the classes enumerated within this section, notwithstanding that at the time the application is filed he may not be included within such classes.

(d) Any person who is within any of the classes described in subsection (a) of this section solely because of past membership in, or past affiliation with, a party or organization may be naturalized without regard to the provisions of subsection (c) of this section if such person establishes that such membership or affiliation is or was involuntary, or occurred and terminated prior to the attainment by such alien of the age of sixteen years, or that such membership or affiliation is or was by operation of law, or was for purposes of obtaining employment, food rations, or other essentials of living and where necessary for such purposes.

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§ 1443. Administration

(a) Rules and regulations governing examination of applicants

The Attorney General shall make such rules and regulations as may be necessary to carry into effect the provisions of this part and is authorized to prescribe the scope and nature of the examination of applicants for naturalization as to their admissibility to citizenship. Such examination shall be limited to inquiry concerning the applicant's residence, physical presence in the United States, good moral character, understanding of and attachment to the fundamental principles of the Constitution of the United States, ability to read, write, and speak English, and other qualifications to become a naturalized citizen as required by law, and shall be uniform throughout the United States.

Instruction in citizenship

(b) The Attorney General is authorized to promote instruction and training in citizenship responsibilities of

applicants for naturalization including the sending of names of candidates for naturalization to the public schools, preparing and distributing citizenship textbooks to such candidates as are receiving instruction in preparation for citizenship within or under the supervision of the public schools, preparing and distributing monthly an immigration and naturalization bulletin and securing the aid of and cooperating with official State and national organizations, including those concerned with vocational education.

Prescription of forms

(c) The Attorney General shall prescribe and furnish such forms as may be required to give effect to the provisions of this part, and only such forms as may be so provided shall be legal. All certificates of naturalization and of citizenship shall be printed on safety paper and shall be consecutively numbered in separate series.

Administration of oaths and depositions

(d) Employees of the Service may be designated by the Attorney General to administer oaths and to take depositions without charge in matters relating to the administration of the naturalization and citizenship laws. In cases where there is a likelihood of unusual delay or of hardship, the Attorney General may, in his discretion, authorize such depositions to be taken before a postmaster without charge, or before a notary public or other person authorized to administer oaths for general purposes.

Issuance of certificate of naturalization or citizenship

(e) A certificate of naturalization or of citizenship issued by the Attorney General under the authority of this subchapter shall have the same effect in all courts, tribunals, and public offices of the United States, at home and abroad, of the District of Columbia, and of each State, Territory, and

outlying possession of the United States, as a certificate of naturalization or of citizenship issued by a court having naturalization jurisdiction.

Copies of records

(f) Certifications and certified copies of all papers, documents, certificates, and records required or authorized to be issued, used, filed, recorded, or kept under any and all provisions of this chapter shall be admitted in evidence equally with the originals in any and all cases and proceedings under this chapter and in all cases and proceedings in which the originals thereof might be admissible as evidence.

Furnished quarters for photographic studios

(g) The officers in charge of property owned or leased by the Government are authorized, upon the recommendation of the Attorney General, to provide quarters, without payment of rent, in any building occupied by the Service, for a photographic studio, operated by welfare organizations without profit and solely for the benefit of persons seeking to comply with requirements under the immigration and nationality laws. Such studio shall be under the supervision of the Attorney General.

(h) Public education regarding naturalization benefits

In order to promote the opportunities and responsibilities of United States citizenship, the Attorney General shall broadly distribute information concerning the benefits which persons may receive under this subchapter and the requirements to obtain such benefits. In carrying out this subsection, the Attorney General shall seek the assistance of appropriate community groups, private voluntary agencies, and other relevant organizations. There are authorized to be appropriated

(for each fiscal year beginning with fiscal year 1991) such sums as may be necessary to carry out this subsection.

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§ 1445. Application for naturalization; declaration of intention

(a) Evidence and form

An applicant for naturalization shall make and file with the Attorney General a sworn application in writing, signed by the applicant in the applicant's own handwriting if physically able to write, which application shall be on a form prescribed by the Attorney General and shall include averments of all facts which in the opinion of the Attorney General may be material to the applicant's naturalization, and required to be proved under this subchapter. In the case of an applicant subject to a requirement of continuous residence under section 1427(a) or 1430(a) of this title, the application for naturalization may be filed up to 8 months before the date the applicant would first otherwise meet such continuous residence requirement.

* * *

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§ 1446. Investigation of applicants; examination of applications

* * *

(b) Conduct of examinations; authority of designees; record

The Attorney General shall designate employees of the Service to conduct examinations upon applications for naturalization. For such purposes any such employee so designated is authorized to take testimony concerning any matter

touching or in any way affecting the admissibility of any applicant for naturalization, to administer oaths, including the oath of the applicant for naturalization, and to require by subpena the attendance and testimony of witnesses, including applicant, before such employee so designated and the production of relevant books, papers, and documents, and to that end may invoke the aid of any district court of the United States; and any such court may, in the event of neglect or refusal to respond to a subpena issued by any such employee so designated or refusal to testify before such employee so designated issue an order requiring such person to appear before such employee so designated, produce relevant books, papers, and documents if demanded, and testify; and any failure to obey such order of the court may be punished by the court as a contempt thereof. The record of the examination authorized by this subsection shall be admissible as evidence in any hearing conducted by an immigration officer under section 1447(a) of this title. Any such employee shall, at the examination, inform the petitioner of the remedies available to the petitioner under section 1447 of this title.

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FILED
DEC 13 1993
OFFICE OF THE CLERK

No. 93-380

In the Supreme Court of the United States

OCTOBER TERM, 1993

JOHN ERIC PRICE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE IMMIGRATION AND NATURALIZATION SERVICE IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was entitled to become a naturalized citizen of the United States despite his refusal to provide, as required by statute, "all facts which in the opinion of the Attorney General may be material to [his] naturalization." 8 U.S.C. 1445(a) (1988 & Supp. IV 1992).

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BRIEF FOR THE IMMIGRATION AND NATURALIZATION SERVICE IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B18) is reported at 962 F.2d 836. An earlier opinion (Pet. App. A1-A19), which was withdrawn, is reported at 941 F.2d 878. The opinion of the district court (Pet. App. D1-D24) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 1992.[1] A petition for rehearing was denied on June 7, 1993. The petition for a writ of certiorari was filed on September 3, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a native and citizen of the United Kingdom. He was granted resident alien status in the United States in 1960 and has resided in the United States since then. On April 21, 1984, petitioner submitted an application for naturalization. He answered all questions on the application form except for Question 18, which required petitioner to list his "present and past membership in or affiliation with every organization, association, fund, foundation, party, club, society or similar group in the United States or in any other country or place, and [his] foreign military service." In response to Question 18, petitioner attached a legal brief contending that the question violated his right of association under the First Amendment. Pet. App. B4.

Petitioner did answer Question 19, denying that he was or ever had been a member of or associated with the Communist Party, had ever knowingly aided or supported it, or had ever "advocated, taught, believed in, or knowingly supported or furthered the interests of Communism." Pet. App. B4. During an examination by a designated naturalization examiner, petitioner also swore (*ibid.*):

[1] The original opinion of the court of appeals was filed on August 7, 1991. That opinion was withdrawn, and the final opinion and order were issued on April 20, 1992.

> I am not and have not been, within the meaning of the Immigration and Nationality Act, for a period of at least 10 years immediately preceding the date of this petition, a member of or affiliated with any organization proscribed by such Act, or any section, subsidiary, branch, affiliate or subdivision thereof, nor have I during such period believed in, advocated, engaged in, or performed any of the acts or activities prohibited by such Act.

At a further preliminary examination, petitioner reaffirmed under oath both his negative answer to Question 19 and that he was not, and never had been, a member of or affiliated with any organization covered by 8 U.S.C. 1424(a) (1988), which described various types of organizations and activities participation in which would bar an alien from being naturalized.[2] Pet. App. B4, B5-B7. When asked about Question 18, petitioner denied any foreign military service and admitted that he had been a member of "any organization," but refused to answer any further questions on that subject on the ground that they were "overbroad" and violated his constitutional rights. Pet. App. B4-B5.

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[2] Petitioner's response was based on Section 1424(a) as in effect at the time of his application and examination. That version is reprinted in pertinent part at Pet. App. B6 n.2. A statutory amendment enacted in 1991 deleted separate prohibitions on affiliations with "Communist-action" and "Communist-front" organizations, see 8 U.S.C. 1424(a)(2)(G)-(H) (1988), but retained an exception for any applicant who can "establis[h] that he did not have knowledge or reason to believe at the time he became a member of or affiliated with such an organization * * * that such organization was a Communist-front organization." 8 U.S.C. 1424(a)(2) (1988 & Supp. IV 1992). The current version of the statute is reprinted at Pet. App. E1-E4.

2. The INS's Designated District Examiner recommended against petitioner's naturalization because petitioner, by refusing to answer Question 18, had failed to prove his eligibility. Pet. App. D4. The district court denied the application for naturalization on the same ground. *Id.* at D1-D24. The court held that petitioner's failure to answer questions regarding his affiliations provided a "facially legitimate and bona fide reason" for denial of his application for naturalization. *Id.* at D23 (quoting *Kleindienst* v. *Mandel*, 408 U.S. 753, 770 (1972)). In the alternative, the court held that "even under a balancing test, the government has a compelling interest in mandating a response to Question 18 as a precondition to naturalization which outweighs any First Amendment right of association of the petitioner to refuse to answer the question." Pet. App. D22.

3. The court of appeals affirmed. Pet. App. B1-B18. The court first concluded that the decision to ask Question 18 was well within the "broad authority given the Attorney General to implement the naturalization statutes," because it is "reasonable to assume that knowing the organizations with which [an applicant] is associated will be relevant to one or more of the requirements for citizenship" that Congress has prescribed. *Id.* at B10. Those requirements include, among others, that the applicant be of "good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States," 8 U.S.C. 1427(a)(3) (1988 & Supp. IV 1992), and that he or she not be affiliated with any organization of the types proscribed by 8 U.S.C. 1424.

The court further held that Question 18 was consistent with the First Amendment. It began by noting (Pet. App. B11) that this Court "has historically afforded Congress great deference in the area of immigration and

naturalization," and indeed that "[o]ver no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." *Ibid.* (quoting *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977)). Moreover, while acknowledging that petitioner, as a lawful resident alien, was entitled to "the greatest degree of constitutional protection afforded a non-citizen" (Pet. App. B13), the court pointed out that he could not be entitled to greater rights than those who were already citizens. The court therefore applied in this case the standard of constitutional review articulated by this Court in cases involving the rights of citizens: that decisions in the area of immigration and naturalization are valid so long as they are made "on the basis of a facially legitimate and bona fide reason." *Id.* at B12 (quoting *Kleindienst* v. *Mandel*, 408 U.S at 770); see also *Fiallo* v. *Bell*, 430 U.S. at 794-795.

The court of appeals rejected (Pet. App. B13) petitioner's contention that requirements for naturalization differ, in this regard, from requirements regarding eligibility for initial or temporary admission into the United States; it remarked that the determination of who will become a citizen is "at least as 'peculiarly concerned with the political conduct of government,' *Galvan* v. *Press*, 347 U.S. 522, 531 (1954), as the decision of who will be allowed to enter, if not more so," because a naturalized citizen is allowed to "participate in the process of governing the country." *Ibid.* The court also concluded (*id.* at B14) that it was appropriate to apply to the Attorney General's implementation of Congress's substantive decisions with respect to eligibility for naturalization the same constitutional standard that is applied to decisions concerning the admission of aliens. And because of the sensitive nature of immigration and naturalization decisions, the court explained that "the reasons for giv-

ing deference to agency decisions . . . in other administrative contexts apply with even greater force in the INS context." *Id.* at B10 (quoting *INS* v. *Abudu*, 485 U.S. 94, 110 (1988)).

Applying these principles, the court reasoned (Pet. App. B9) that to omit Question 18 and to limit investigation in the ways suggested by petitioner would

> requir[e] the INS to rely on [applicants'] own determinations [about] whether particular organizations are of the prohibited type, rather than allowing the Service to make that determination, and [would] not address the possibility that [an applicant] may wrongly believe that an organization with which he is affiliated does not fall within section 1424(a).

In addition, the court determined that Question 18 "could reasonably reveal information relevant to other requirements for naturalization." *Id.* at B16; see *id.* at B10. Thus, the court concluded that the Attorney General had "facially legitimate and bona fide" reasons for relying upon Question 18 to help determine whether petitioner was eligible for naturalization. *Id.* at B16.

Judge Noonan dissented (Pet. App. B16-B18), contending that the First Amendment requires the government to ask applicants for naturalization more narrowly tailored questions, focusing on whether they belong to foreign military or intelligence organizations or groups committed to subversion or terror. *Id.* at B18.

ARGUMENT

The Constitution confers upon Congress the power "[t]o establish an uniform Rule of Naturalization." U.S. Const. Art. I, § 8, Cl. 4. Moreover, as the court of appeals pointed out (Pet. App. B11), this Court "has historically afforded Congress great deference in the area of immi-

gration and naturalization"; indeed, "over no conceivable subject is the legislative power of Congress more complete." *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977) (quoting *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U.S. 320, 339 (1909)).

Under the naturalization statutes now in effect, an applicant for naturalization must be a lawfully admitted permanent resident alien (8 U.S.C. 1429 (1988 & Supp. IV 1992)), must have resided in the United States for at least five years prior to the filing of the naturalization application (and during the time subsequent to filing the petition and prior to admission to citizenship), and must have been physically present in the country for at least half of that time (8 U.S.C. 1427(a)(1) and (2) (1988 & Supp. IV 1992)). In addition, during the same period, the applicant must be a "person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States." 8 U.S.C. 1427(a)(3) (1988 & Supp. IV 1992). Finally, the applicant must not have engaged in activities or been affiliated with organizations of the types specified by Congress in 8 U.S.C. 1424(a) (1988 & Supp. IV 1992) (including anarchist, Communist, totalitarian, and politically violent or destructive groups; see Pet. App. B6 n.2 (reproducing portions of 8 U.S.C. 1424(a) (1988)).

Congress has given the Attorney General broad discretion to "prescribe the scope and nature of the examination of applicants for naturalization," in order to determine whether they meet the statutory criteria for admission to citizenship. 8 U.S.C. 1443(a) (1988 & Supp. IV 1992). Specifically, the Attorney General has authority to require from an applicant "averments of all facts which in the opinion of the Attorney General may be material to the applicant's naturalization, and required to

be proved under [the relevant statutory provisions]" (8 U.S.C. 1445(a) (1988 & Supp. IV 1992)), and to authorize INS employees "to take testimony concerning any matter touching or in any way affecting the admissibility of any applicant for naturalization." 8 U.S.C. 1446(b) (1988 & Supp. IV 1992).[3]

In carrying out these statutory responsibilities, the Attorney General has since 1949 asked all applicants for naturalization—including more than 7.2 million now-naturalized citizens—some version of the question regarding past and present organizational affiliations that petitioner refused to answer. See Pet. App. D4 & n.2. The court of appeals correctly concluded that the Attorney General may require petitioner to respond to that question before approving his application for citizenship. The court of appeals' decision does not conflict with any decision of this Court or of any other court of appeals, and it does not warrant further review.

1. Petitioner first contends (Pet. 9-11) that Question 18 exceeds the bounds of inquiry permitted to the Attorney General by the naturalization statutes. This Court has previously made clear, however, that "[t]he Government is entitled to know of any facts that may bear on an applicant's statutory eligibility for citizenship, so that it may pursue leads and make further investigation if doubts are raised." *Berenyi* v. *District Director*, 385 U.S. 630, 638 (1967). As the courts below concluded (Pet.

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[3] See also 8 U.S.C. 1443(a) (1988 & Supp. IV 1992) (examination prescribed by the Attorney General "shall be limited to inquiry concerning the applicant's residence, physical presence in the United States, good moral character, understanding of and attachment to the fundamental principles of the Constitution of the United States, ability to read, write, and speak English, and other qualifications to become a naturalized citizen as required by law, and shall be uniform throughout the United States.").

App. B9-B10, B16, D9-D12), Question 18 seeks information material to determining whether an applicant is qualified for naturalization. Under 8 U.S.C. 1424(a) (1988 & Supp. IV 1992), such information could include membership in anarchist, Communist or certain other organizations. Under 8 U.S.C. 1427(a)(3) (1988 & Supp. IV 1992), it could include information about associations indicative of whether the applicant is a person of "good moral character" and is "well disposed to the good order and happiness of the United States." The answer might, for example, reveal that the applicant was a member of a terrorist group, a drug-smuggling enterprise (see *United States* v. *Abdulghani*, 671 F. Supp. 754 (N.D. Ga. 1987)), or a Nazi hate group (see *United States* v. *Schellong*, 547 F. Supp. 569 (N.D. Ill. 1982)). Finally, disclosure of an applicant's memberships in organizations might help the Attorney General determine whether the applicant has been a bona fide resident of the United States for the period required by statute. 8 U.S.C. 1427(a)(1) and (2) (1988 & Supp. IV 1992).

Petitioner argues (Pet. 20-21) that the Attorney General could satisfy her statutory responsibilities by asking only specific, yes-or-no questions concerning petitioner's associations with particular types of proscribed groups. The court below correctly rejected that argument. Pet. App. B9-B10. Under the Act, it is the Attorney General and the district court—not petitioner—who bear ultimate responsibility for determining whether any group with which petitioner may have been associated comes within one of the statutory prohibitions, or raises questions concerning his moral character, his disposition toward the good order and happiness of the United States, or his satisfaction of pertinent residency requirements. Nothing in the Act or the Constitution requires the Attorney General to accept petitioner's own

judgment concerning the relevance of one or more of his associations to any of those questions.[4]

Petitioner cites *Girouard* v. *United States*, 328 U.S. 61 (1946), for the proposition that naturalization statutes, and the Attorney General's investigative authority thereunder, should be construed narrowly so as to avoid any question of a First Amendment violation.

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[4] As the court of appeals pointed out (Pet. App. B9-B10), this point is particularly clear in relation to associations that may be proscribed only if an applicant was or should have been aware of the true nature of their beliefs, goals or activities. The court discussed in particular 8 U.S.C. 1424(a)(2)(H) (1988), in effect at the time of petitioner's application, concerning association with "Communist-front organization[s]." Although subsection (H) was repealed in 1991 (see Immigration Technical Corrections Act of 1991, Pub. L. No. 102-232, Tit. III, § 309(b)(13), 105 Stat. 1759), the amendment did not affect the proviso, now applicable to any association otherwise proscribed under Section 1424, that the applicant may show "that he did not have knowledge or reason to believe * * * that such organization was a Communist-front organization." Similarly, 8 U.S.C. 1424(a)(3)-(6) describes prohibited associations or activities some of which include a specific knowledge requirement, and others of which might be carried on by an organization without the knowledge or active participation of all of its members or associates. As the court of appeals observed (Pet. App. B9 & n.3), this case does not present the question of what sort of knowledge or what degree of association might be required to deny naturalization to an applicant who could show ignorance of the proscribed beliefs or activities of a particular organization. The point remains, however, that such an applicant—or one who could plausibly claim such a lack of knowledge or involvement—would fail to answer "yes" to any question that merely catalogued specific proscribed activities. The Attorney General is not compelled to accept such an answer, whether innocent or dissembling; she is entitled to evaluate for herself, based on broader knowledge and experience than may be available to the individual applicant, the nature of the groups with which an applicant has been associated.

See Pet. 9-11. In *Girouard*, the Court refused to read a statute that required an applicant for naturalization to swear to "support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic," to sanction the further requirement, imposed only by the application form, that the applicant swear to "take up arms in defense of this country." 328 U.S. at 62. But *Girouard* did not read a broad statute narrowly in order to avoid constitutional questions; if anything, the opinion suggests that there would have been no limit on Congress's authority to adopt a "bear arms" requirement had it chosen to do so. *Id.* at 69-70.

As the court of appeals recognized (Pet. App. B14-B16), *Girouard* turned on this Court's conclusion that Congress had not expressly imposed willingness to bear arms as a requirement for naturalization (see 328 U.S. at 64), and that there were cogent reasons—based not only on traditions of religious tolerance, but also on other uses of the same oath and on specific congressional actions permitting naturalization of other religious noncombatants—not to infer such a legislative intent. *Id.* at 65-70. Those conclusions have little bearing on this case, in which Congress has set particular requirements for naturalization and has broadly authorized the Attorney General, in conducting naturalization investigations, to require "averments of all facts which in [her] opinion * * * may be material to the applicant's naturalization," and to ask questions "concerning any matter touching or in any way affecting" the fulfillment of the statutory requirements. 8 U.S.C. 1445(a), 1446(b) (1988 & Supp. IV 1992). Where a statutory provision is plain and an administrative implementation well within its bounds, the courts should not adopt strained constructions under the guise of avoiding constitutional questions. See, *e.g.*, *Moore Ice Cream Co.* v. *Rose*, 289 U.S. 373, 379 (1933).

2. Petitioner further contends (Pet. 11-21) that Question 18 violates his rights of free association under the First Amendment. The courts below also correctly rejected that contention.

"No alien has the slightest right to naturalization unless all statutory requirements are complied with." *Fedorenko* v. *United States*, 449 U.S. 490, 506 (1981) (internal quotation marks omitted); accord *Schneiderman* v. *United States*, 320 U.S. 118, 131 (1943); *Tutun* v. *United States*, 270 U.S. 568, 578 (1926); *United States ex rel. Turner* v. *Williams*, 194 U.S. 279, 290 (1904). Moreover, "the burden is on the alien applicant to show his eligibility for citizenship in every respect." *INS* v. *Pangilinan*, 486 U.S. 875, 886 (1988) (quoting *Berenyi* v. *District Director*, 385 U.S. at 637); accord *Kimm* v. *Rosenberg*, 363 U.S. 405, 406 (1960) (per curiam).

Resident aliens are, of course, entitled to protection of their rights under the First Amendment. See, *e.g.*, *Kwong Hai Chew* v. *Colding*, 344 U.S. 590, 596 n.5 (1953) (quoting *Bridges* v. *Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring)). In the context of an application for naturalization, however, the scope of those rights may be limited by the government's compelling interest (and Congress's near-plenary constitutional power) in regulating immigration and the conferral of citizenship on those who have no direct constitutional entitlement thereto.[5] See *Reno* v. *Flores*, 113 S. Ct. 1439,

[5] Indeed, as the district court held (Pet. App. D20-D22), the government's interest is sufficiently compelling to sustain the Attorney General's decision to ask Question 18 in this case, even if that decision were properly subject to a heightened standard of review. The court of appeals did not address that question because it concluded, correctly, that the validity of Question 18 should be evaluated under the lesser standard discussed in the text.

1449 (1993) ("in the exercise of its broad power over immigration and naturalization, 'Congress regularly makes rules that would be unacceptable if applied to citizens' ") (quoting *Fiallo* v. *Bell*, 430 U.S. at 792, quoting *Mathews* v. *Diaz*, 426 U.S. 67, 80 (1976)).[6]

In any event, resident aliens are entitled to no greater constitutional protection than is afforded to citizens, and this Court has made clear that even as to the rights of citizens, the scope of judicial review of decisions in the sensitive area of immigration and naturalization is exceptionally narrow. In *Kleindienst* v. *Mandel*, for example, the Court considered a challenge to the Attorney General's decision to exclude from the United States, as permitted by statute, an alien academic who "advocate[d] the economic, governmental, and international doctrines of world communism." 408 U.S. at 756. Aside from Mandel himself, the plaintiffs were American scholars asserting a constitutional right, as citizens, to meet and confer with Mandel; the Court explicitly noted that no right was asserted on behalf of the alien himself. *Id.* at

[6] Petitioner contends (Pet. 19) that Question 18 violates his First Amendment rights because it would not be permissible for the government to ask a citizen to list all of his or her group associations in an application for continuing employment as a schoolteacher. See *Shelton* v. *Tucker*, 364 U.S. 479 (1960). The primary distinction between this case and *Shelton* is not one between citizens and resident aliens, but one between the unique context of immigration and naturalization decisions and the ordinary context of routine government employment decisions. Cf. *Ambach* v. *Norwick*, 441 U.S. 68 (1979) (State may exclude from public school teaching positions aliens who have declined to apply for naturalization). In this regard, resident aliens applying for naturalization are subjected not so much to "rules that would be unacceptable if applied to citizens" (*Mathews* v. *Diaz*, 426 U.S. at 80), but to rules that are relevant and sensible in a context that has no precise analogue applicable to those who are already citizens.

759-760, 762. Although it acknowledged (*id.* at 764-765) that the citizen plaintiffs' First Amendment rights were implicated, the Court found those rights insufficient to prevail against the "plenary congressional power to make policies and rules for [the] exclusion of aliens." *Id.* at 769. Where that power had been delegated by statute to the Attorney General, and exercised "on the basis of a facially legitimate and bona fide reason," the Court explained that it would "neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant."[7] *Id.* at 770.

The Court reaffirmed its application of the deferential "facially legitimate and bona fide" standard of review in *Fiallo* v. *Bell*, *supra*. The plaintiffs in that case asserted rights on behalf of U.S. citizens and resident aliens to equal treatment for fathers and their illegitimate children in the award of certain special immigration privileges. See 430 U.S. at 788-790. In arguing that the Court's precedents recognizing Congress's sweeping powers in such areas (see *id.* at 792-793) should not control the case, the plaintiffs specifically pointed out that they asserted the rights not of aliens seeking entry but of citizens and permanent residents. *Id.* at 794. The Court responded, however, that it could "see no reason to

[7] *Mandel* recognized and deferred to the executive *implementation* of Congress's legislative decision to exclude certain aliens, subject to waivers available in the discretion of the Attorney General. See 408 U.S. at 767-770. That ruling disposes of petitioner's argument (Pet. 17-18) that he challenges only the Attorney General's "*method* of accomplishing the substantive task" delegated to her by Congress, and that her decisions in that regard are not entitled to the deference accorded the underlying legislative choices they are designed to effectuate.

review the broad congressional policy choice at issue * * * under a more exacting standard than was applied in *Kleindienst* v. *Mandel*, a First Amendment case." *Id.* at 795. See also *Wauchope* v. *United States Dep't of State*, 985 F.2d 1407, 1412-1414 (9th Cir. 1993) (applying *Mandel* standard to claim that statute violated rights of citizen mothers by allowing only citizen fathers to transmit citizenship to foreign-born children).

Although both *Mandel* and *Fiallo* involved rules excluding particular aliens from initial entry into the country, there is no reason to apply a different standard to legislative and executive decisions made in the context of evaluating an admitted alien's final application for naturalization. The Constitution explicitly grants Congress authority over "Naturalization" (U.S. Const. Art. I, § 8, Cl. 4), whereas the power to regulate immigration is implied as part of that and other of Congress's enumerated and inherent sovereign powers (see, *e.g.*, *Fiallo*, 430 U.S. at 792); and this Court has recognized the breadth and exclusivity of Congress's power in the naturalization as well as in the immigration context. See, *e.g.*, *INS* v. *Pangilinan*, 486 U.S. 875, 882-885 (1988) (courts have no power to confer citizenship other than in accordance with statutory authority); *Fedorenko* v. *United States*, 449 U.S. 490, 506-507 (1981) ("Congress alone has the constitutional authority to prescribe rules for naturalization"); *Berenyi* v. *District Director*, 385 U.S. at 636-637 (government has a "strong and legitimate interest in ensuring that only qualified persons are granted citizenship"). For purposes of defining standards of review, there is no logical distinction between Congress's power to regulate who may enter the country as an alien (see, *e.g.*, *Kleindienst* v. *Mandel*, *supra*) and its power to set the terms, conditions and procedures for naturalization for persons who are otherwise aliens—

whether at birth outside the United States (see *United States* v. *Wong Kim Ark*, 169 U.S. 649, 702-703 (1898)) or after a long period of residence therein. And even if there were such a distinction, "admission of an alien to citizenship is," as the court of appeals observed (Pet. App. B14 n.7), "at least as fundamental to the identity of the nation as the initial decision of whom to admit." The court of appeals was therefore correct to accord decisions concerning the former "at least as much judicial deference" as those concerning the latter. Pet. App. B13.

Applying the appropriate standard, both courts below held that the Attorney General had a facially legitimate and bona fide reason for requiring a response to Question 18, because a list of an applicant's present and past associations is material to allowing responsible INS officials to determine for themselves whether the applicant meets all of the criteria for naturalization that Congress has set forth. Pet. App. B13-B16, D19. For the reasons outlined above (see pages 11-13, *supra*), that decision is correct, and requires no further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1993